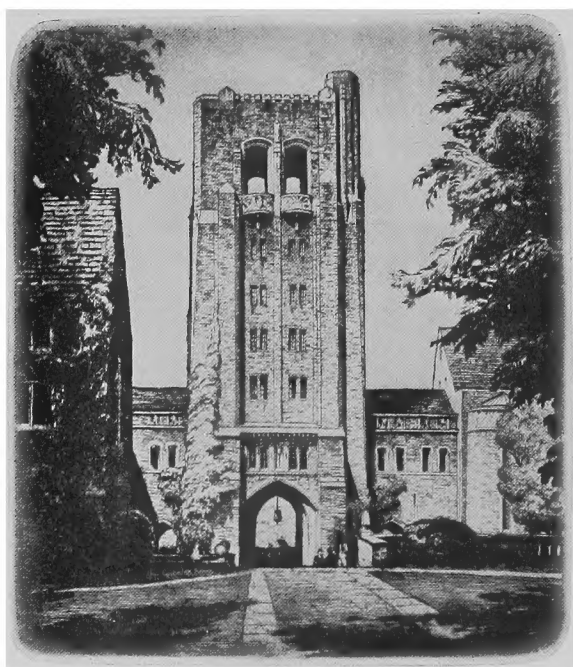




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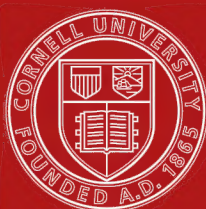
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# INTERNATIONAL LAW

PRIVATE AND CRIMINAL.

BY  
KARL LUDWIG VON  
DR. L. BAR,

PROFESSOR IN THE UNIVERSITY OF GÖTTINGEN.

Translated, with Notes,

BY

G. R. GILLESPIE, B.A. OXON.,

ADVOCATE.

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## TRANSLATOR'S PREFACE.

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THE reputation of Professor Bar on the Continent and in America has induced me to undertake this translation, and I have endeavoured, by collecting in notes references to recent authorities and decisions in different countries, to carry out the main object of his work, by supplying practising lawyers with a practical handbook for reference. These notes are inclosed in square brackets thus [ ]. The decided cases there cited are for the most part taken from the "Journal du Droit International Privée," published by M. Edouard Ch Janet, advocate in the Court of Appeal at Paris.

Since the date of the last edition of Bar's work (1862), the German Empire has been established, and a criminal code, and a code of procedure applicable to all the States of the Empire, introduced; the latter was passed in 1877, and has been in force since 1st October, 1879; the former was re-enacted in 1876. Many of the references in this volume have thus ceased to be accurate as statements of existing law or practice, but I have thought it better to retain them in their original form, since their value as illustrations is undiminished, and to state shortly in supplementary notes the effect of the new state of the law. I have had the advantage of reading two pamphlets by the author, both published in 1882, entitled "Civil Process," and "Internationales Privatrecht," which have assisted me in the

statement of German law as it now stands ; for these pamphlets, and for his kindness in explaining some difficulties that had occurred to me, I have to thank the author.

I have also to acknowledge my obligations to Mr. Westlake, and my brother, Mr. W. Guthrie, for the aid I have got from their labours in the same direction.

EDINBURGH, *November*, 1882.

## AUTHOR'S PREFACE.

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THE constant and vast growth of the intercourse between individual States in modern times gives special importance to our subject ; and therefore the attempt to solve the vexed questions of law that belong to it may reckon on approval in so far as it succeeds in attaining its end.

The more modern treatises on these questions of law that have as yet made their appearance may correctly enough be divided into two classes. The first, for the most part of German origin, has undertaken to settle all problems exclusively on general logical principles ; and it cannot be denied that in this way the falsity of many of the older theories has been demonstrated, and an important step thus made to gain a firm basis for the doctrines that belong to our subject.

But there is in these treatises a lack of a thorough examination of particular cases, which must be the touchstone of every general theory, however ingenious it may be, and less attention than is necessary is paid to earlier literature and the enormous wealth of decided cases. We may not, perhaps, be entitled to make any complaint of this omission, since it was no part of the plan of the works of which we speak to make an extensive use of the literature of the subject, but, nevertheless, we cannot but feel the want of it. Even Wächter's well-known essays cannot satisfy this want, for, however wide and careful his employment of earlier German literature is, a consideration of foreign literature is, in consequence of the scheme of his work, closed to him ; and since

the publication of those essays on the conflict of the private statutes of different provinces, science has been enriched by an important work in this department,—viz., the eighth volume of Savigny's system. We have still, however, to lament the want of any attempt at an historical analysis of these doctrines that shall strive to draw from the various mistaken theories a comparative truth. All we have had as yet is a clever, but entirely unsatisfactory, body of criticism.

The second class, consisting of French and English writings, unites a thorough examination of particular cases with an extensive use of the literature and decisions of foreign courts. The want of uniform axioms in these works, however, forces itself on our attention, while we have to desiderate here also a historical exposition of the various doctrines. The reader who consults them for any particular case is not sure that the proposition laid down in one place may not be recalled or at least materially qualified in another, and the feeling is very apt to spring up that there are no legal principles at all in international law, and that all questions must be determined on indefinite considerations of equity—a conclusion which is indeed expressly maintained by some authors.

In spite, therefore, of the wealth of literature on this subject, there is room for the production of a work which has for its object to combine a thorough examination of particular cases with a logical analysis of general principles, to make use of German and foreign literature and the decisions of the courts of different countries, and to employ the comparative truth of older theories to establish its own views.

The author has not been able to hide from himself that that is a comprehensive and difficult task; and if he had from the first fully grasped its difficulties, he probably would not have essayed what is perhaps too great for his powers. He was, however, at first of opinion that it would be useful to expound and to carry out to their full extent the theories

which had spread more widely in Germany than elsewhere, and that this might be done without any very comprehensive inquiry as a preliminary. When his work, which was suggested by various cases that actually occurred to him in practice, was begun, and as it proceeded, he came to be of a different opinion.

The object he always tried to attain was to produce a work of practical value : to give the judge and the practitioner a review of the literature, an exposition and criticism of the various theories of the subject, and a list of analogous decisions applicable to any case that might come before them. And to this end the author hopes that, in spite of the very obvious shortcomings that must, in so difficult a subject, be found in the conception and treatment of his own views, he has not worked altogether unprofitably. He has attempted to divide his subject in conformity with that plan ; faults of arrangement must be excused by the difficulties of the subject, which has not to deal with one system of definite and positive law, but with the systems of legislation in different States starting from the most various points of view.

It is hoped that the work itself will justify the combination of private and criminal law and procedure. Certain general doctrines are common to both these branches of law : the doctrine of domicile and nationality so often discussed in treatises on international law must enter into both private and criminal law, and indeed the combination of the two branches of inquiry is urgently recommended by an authority of weight (v. Mohl). It may be that the propositions laid down in the one subject and in the other will mutually strengthen each other.

On the other hand, it was not intended to give a complete table of the positive enactments applicable to the subjects under discussion which are in force in different countries. These will only be noticed in so far as it may be necessary to do so in order to explain or to test the different theories that

make their appearance even in the acts of the legislature, or to prove the existence of a consuetudinary international law. The works of Burge and Fœlix have given us such an excellent comparative view of positive rules of law, that it would hardly be possible to produce anything better. As far as private law is concerned the profit that is to be made out of the different systems of legislation, in the way of general propositions that bear upon the conflict of laws, comes to nothing more than a few general propositions that will bear the most various meanings.

It may be added, with special reference to Germany, that if a comprehensive and uniform system of legislation should ever be realised, it may then be possible, following Savigny's indication of the connection that exists between the local limits to the authority of rules of law, and the limits in time, to make some use of the discussions to be found in this work in the kindred subject of the application of new laws : at the very least many of the questions here dealt with will continue to have a significance even by the side of a greater work of legislation that will embrace all Germany.

Perhaps, too, an examination of the way in which the different systems of law work as they meet in international questions, may, if it is undertaken in the proper way, contribute something to advance the knowledge of these different systems themselves.



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# INTERNATIONAL LAW,

## PRIVATE AND CRIMINAL

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### First Part.

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#### HISTORY, LITERATURE, AND PRINCIPLES OF INTERNATIONAL LAW, PRIVATE AND CRIMINAL.

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#### I. INTRODUCTION.

##### § 1.

IF two natives of this country conclude a contract here about something that is situated here, and thereafter a law-suit comes to depend before a judge of this country about that contract, no one doubts that the judge must apply our laws exclusively, and must determine the status and capacity of the contracting parties, the form of the contract, the meaning of the reciprocal obligations, and the rights of the parties in the conduct of the suit in accordance with them. This is so certain, that it seems quite superfluous to inquire why it is that our laws alone can be applied.

But on the other hand, if two foreigners conclude a contract in our territory, shall the law of the country of the contracting parties, or of the place where the contract is made, rule? And what is to be the result if the subject of the contract is situated in a third State, and the suit should happen to depend in a fourth?

Or, to take another instance, a criminal who has robbed a native of this country here, and is caught in this country, will undoubtedly be punished in accordance with our laws,

and it is the head of our State only who is privileged to pardon him.

But what is the rule if a citizen of our country has injured a foreigner in a foreign country, and betakes himself to some third country? Does the right and duty of punishment belong in this case to the country of which the criminal is a native, or to that in which the crime was committed, or to that to whose territories the criminal has betaken himself? It seems natural to believe that on these questions, which may be described as the application of the laws of different States to the international relations of private citizens, and which are denoted, except in Germany, by the general title of Private International Law, some fixed general principles must have been adopted, and that there can only be room for criticism and correction on isolated points of detail.

One is apt to think that this assumption is warranted by the traffic that has so long existed between different peoples: some fixed principles must surely have grown up to regulate it. How can the merchant engaged in foreign trade send off his goods, unless he knows what are the rights he acquires against the purchaser in a foreign country, or what are the obligations he undertakes?

It is quite true that if foreign commerce is not in any country very extensive—as was the case in ancient times, and to some extent in the Middle Ages—if credit is limited, and the operations of trade are carried on by ready money payments or by barter; if the legal capacity of foreigners is limited, and they are forbidden to acquire land or to succeed to property; and if the laws of the different countries are but imperfectly developed—in such a state of matters it is possible to conceive trade existing without any such principles to regulate it. It is the necessary consequence of such simplicity in the modes of traffic all over the world, that the peculiarities of local laws are less prominent, and the general principles that regulate trade and exchange of goods must always be alike among all people, and as a matter of fact are so.

But on the other hand, the case is very different if, as in our own time, and since new quarters of the globe began to be discovered, traffic is ever advancing, and giving rise to the most complicated business transactions, while foreigners enjoy

the rights of citizenship as fully as citizens themselves, and criminals can quit their own country for another hemisphere with very little trouble, and without having to pay for their flight by a loss of legal status in their new country.

This seems to be a state of things in which some answer, however general, must have been given to the question as to the application of the laws of foreign States : and yet upon comparing the views of the writers on the subject, and examining the judgments of courts of law, we find that there is the very greatest difference of opinion, not merely as to the extent to which it is right or necessary to apply the laws of foreign States, but as to the first question of all,—viz., why they are to be applied ; and even where there is more unanimity than usual on some particular rule, qualifications and exceptions are so numerous, that they cast doubt upon the rule itself. In the statute books of the different States, we find very few definite utterances on this subject, and these are entirely independent of each other, so much so, that it looks as if their Legislatures, if we except laws and treaties for the punishment and extradition of criminals, had purposely omitted to decide these important questions.<sup>1</sup>

It may no doubt be said that, in so far as regards commerce and civil privileges, every prudent man will adapt the legal obligations into which he enters to the various systems of law under which it is possible for them to fall. But how is it possible, in the midst of the vast commercial relations of different countries, to determine beforehand in what country, and before what tribunal, any particular transaction may ultimately find itself ? and if in this or that case so much may be determined according to probabilities, how laborious, and very frequently how hopeless, it must be, while the utterances of different systems of law are so contradictory, to observe the different forms that may be necessary, to induce the subjects of more or less distant States to accept them, or even to do so little as merely to ascertain with certainty what is the law that rules in a remote quarter of the earth.

Thus we reach almost insensibly the conclusion that there

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<sup>1</sup> Cf. Savigny, § 348, Guthrie, p. 69.

must, after all, be some principles which are in the main established; and that, although there may often be mistakes in tracing their origin, and a rule may be stretched too far, or be indistinct or misunderstood, still there is such a thing as international law, practically recognised, for the questions that arise in the intercourse of private citizens.<sup>2</sup>

We do not propose in this work to be content with setting up an abstract *a priori* theory. We propose to discover the law that is practically recognised, and to lay it down as sharply and clearly as possible. To do this, it will be necessary to draw general principles from the isolated rules that are fully admitted, and by their help again to construct the details of the system.

It is necessary, in order to determine the scope of the questions that belong to our subject, and its relation to other departments of law, to distinguish between it and public international law. Public international law deals with the relations of sovereign States as such to each other. In it we do not inquire whether the laws of this or of that particular State are to be applied to the case in hand—that is set entirely out of view; but we inquire whether the separate States have any common legal relation to each other, apart from their domestic polity, and if so, what that relation is.<sup>3</sup> Both public and private international law are part of what is called international law. The common basis on which both rest is the intercourse of States, and there are some topics which may be equally well assigned to either. This is pre-eminently true of criminal law. In so far as it treats of the extent to which the individual is bound by the criminal statutes of some particular State, it seeks to apply rules for the international relations of private citizens; and in so far

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<sup>2</sup> In criminal law the want of general propositions on international law is not so much felt; consequently there is not, even at the present time, any generally recognised basis for its rules; cf. *infra*, §§ 132 *et seq.* [The territorial principle—*i.e.*, the principle that the criminal law of every country is applicable to all acts committed within its own territory, and is excluded from the acts of its subjects committed abroad, is adopted as the basis of the criminal law of England and Scotland; but see § 139 for the qualifications attached to it.]

<sup>3</sup> Fœlix i. § 1; Heffter *Volkesrecht*, § 1.

as the question is concerned with the right of the individual State to bring the criminal to judgment, or with the duty of other States to assist in carrying out the sentence, the prominent consideration is the relation of one State to another. The same thing may truly be said of an idea that lies at the root of the whole subject, the nationality or citizenship of individuals. The claim which any individual makes to belong to any particular State falls under private international law, while the duty of States to recognise the nationality of an individual may be classed under the head of public international law.

In this view, we might reasonably enough treat of private and public international law in connection with each other, if we gave to both equal prominence. We should not be justified, as is so often the case where they are discussed together, in taking up the international relations of private persons merely as a part of the other. So treated, one branch of the subject which deserves just as detailed discussion as the other, would appear in a false light.

The only proper theory of public international law—viz., a duty that sovereign States owe to each other—does not exhaust the question; and that is the explanation of the brief propositions, and the cursory remarks on the subject of the international relations of private persons, which is all that is to be found in those authors who deal with it in two or three chapters of a work upon public international law.

But again, private international law is just as little a part of the private law or the criminal law of any individual State. We may, no doubt, take up the provisions which each State makes for the treatment of foreigners, and the application of foreign laws. But if we once take our stand upon any particular system of positive law, the result must inevitably be that the limits of our work on international law will become very narrow, or else we shall be landed in a confusion between the particular provisions of different States and the general rules of international law. In the first case, when we consider how scanty these legislative provisions are in any State, our task seems as if it comprehended very little; in the second, we shall mistake its whole character. To warrant this conclusion, one has only

to refer to the works on Roman<sup>4</sup> and German private law which have been so much used, and once were recognised as excellent. The proper course is that which Arndt takes in his more modern work on the Pandects, to leave out in such works the discussion of international law altogether. But it is, at the same time, always possible to find much excellent matter here and there in the handbooks on the positive law of different States, as we shall have to notice when we come to the subject of criminal law. The discussions, however, on our subject are in these works always found mixed up with discussions of public international law. If, then, we must decide upon separating our subject (except in any particular case where our discussion is confined to some one system of legislation), from any exposition of the positive law of any one country, we have yet to decide how far we can combine private law and criminal law, which really belongs to the department of public law. It must be admitted, as Demangeat, in the fourth edition of Fœlix's Works (p. 2, note A), points out, that logically the whole subject of international intercourse may be divided into three parts—viz. (1), The relations of sovereign Governments to each other; (2) the relations between Governments and the individual subjects of foreign States; (3) the relations between individual subjects of different States. It is not possible, however, to carry out this logical classification, when we scan it more closely, without breaking up the plan on which particular systems of law are arranged. For example, in a civil suit the rights of the State, as well as the rights of the parties, may have to be considered, as in the case of restraints or impediments placed on marriage, whereby the magistrates are required, in discharge of their duty, to see that certain kinds of marriage are declared null. Such subjects fall under two of the above categories.

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<sup>4</sup> Savigny's System of Roman Law might be cited as an instance of the opposite. The truth is, however, that that work is not confined to an exposition of the rules of Roman law. It has for its object, at the same time, to ascertain the grounds on which the different systems of law rest, and is particularly directed to the means which are necessary for the exchange of property among mankind. This, therefore, leads him beyond the circle of the one positive law, as may be seen by the numerous references he makes to the laws of foreign countries.



This practical view, and also the belief that one common basis can be assigned to all questions that belong to the international intercourse of private persons, whether these questions relate to criminal statutes, or to the rules of the law of property, or to the forms of procedure, have without doubt moved foreign authors like Fœlix, Burge, and Story, to a common treatment of the departments of criminal law, of property law, and of procedure, to which older authors too, such as P. Voet and Burgundus, were no strangers. This combination, however, is most pressingly urged by one of the most weighty German lawyers in the department of public law (R. von Mohl, p. 182), and it seems to be justified by the reflection that one and the same inquiry—viz., as to the position of an individual subject of any State in his foreign relations (using that expression in its most comprehensive sense)—furnishes, according to the direction of the inquiry, the subject both of private international law and of criminal international law ; while, on the other hand, it is the inquiry as to the relation of sovereign States to one another that supplies the subject of public international law.

It would be inaccurate to call this composite whole “private international law,” although foreign authors, for want of another expression that should take in the whole subject, avail themselves of that name. To avoid misapprehension we have called our subject, “international law, private and criminal.”

Our subject has even recently been on several occasions<sup>5</sup> entitled “the doctrine of the conflict of laws or statutes,” a title which was formerly almost universal ; this title is not only too narrow, if there is to be an examination of criminal law and the law of procedure at the same time, but has a distinctly prejudicial effect upon the treatment of the subject, as is pointed out by Savigny (*System* viii. p. 3, Guthrie, p. 48). It is thereby assumed that the laws of different countries will always come into collision with each other, so soon as the question of their application in the individual case is raised ; whereas it is quite likely that they will all be in harmony,

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<sup>5</sup> For instance by Story, Beseler, *Deutsches Privatrecht* (i. § 38), Wächter. These authors have certainly done so without any prejudicial results.

and all commit the decision of the question to the same code and to the same tribunal. As a matter of fact, that is what is found to happen as a general rule, even in those cases that seem most complicated. That this is so will perhaps be proved in the following pages. As Savigny pointedly remarks, laws, as might naturally be expected, come into collision only in secondary and subordinate questions. A conflict does not arise because the laws which may possibly be applied to the particular case are different ; it does not arise except where the codes of different States, all differing from each other, desire to bring one particular case each under its own jurisdiction. It cannot of course be denied that cases of this description do however occur. Savigny, and after him others (*e.g.* Gerber, *D. Privatrecht*, § 32) use the expression "local limits of the rules of law." But, if it is conceded that certain rules of law follow the individual wherever he goes, and that the laws of our country, for example, are frequently applied by the judges of a foreign country, it will not be possible to hold that an expression which would make it appear that the jurisdiction of a rule of law in international relations is local, is accurate or apt ; on the contrary, since the rules of law travel with the person or thing to which they belong, from one foreign country to another, one would rather be inclined to speak of them as if the locality where the thing or person happens as a matter of fact to be were quite immaterial. Besides, the insufficiency of the expression is further illustrated, if, as in Savigny's own case, the range of discussion embraces domicile and nationality ; for these subjects are concerned with this very inquiry, whether a particular person, without respect to his local situation, belongs to the jurisdiction of one State or another.

In some treatises (*e.g.* Thöl, Eichhorn,) the subject is treated under the name of "the relations of the various sources of law," or more accurately, "of the co-ordinate sources of law." This expression is certainly correct, if the inquiry is to be limited to material private law, and is therefore quite justifiable in the treatises that admit such a limitation. But it does not suit an inquiry that embraces the law of procedure ; for instance, the subject of the execu-

tion of foreign judgments cannot be brought under it at all. And it will also be observed, that although such a description may be fully understood as the heading of a chapter in a treatise of German law, it is easily exposed to misconstruction if it is employed as the title of a monograph.

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## II. HISTORICAL DEVELOPMENT.

### A. ROMAN LAW.

#### § 2.

Many attempts have been made to find in the authorities of the Roman law general principles for the application of the laws of different countries, but with very scanty success. Commentators and later authors have hung their own discussions on the conflict of laws upon different passages, *e.g.*, on the first title of the Codex, *de Summa Trinitate*. But, as is obvious from the first glance, it is not their purpose to make any special application of the passages they cite. The discussion, for example, might just as well take place upon any other passage as upon that on which it is generally raised—viz., *Cunctos populos quos clementie nostræ imperium regit*. For nothing at all can be drawn from the passage save that the emperor can only proclaim laws to the peoples whom he rules—a proposition for which we need not seek authority in the *Corpus Juris*.

All that is proved is as follows:—

It is well known that the ancients knew nothing of a general peaceable intercourse. The citizen of a State that had no special alliance with the people of Rome, was held strictly speaking as an outlaw; and a Roman, in the same way, so long as he remained in the hands of the enemy, was considered, in so far as his rights of citizenship were concerned, as dead.<sup>1</sup>

By degrees the strictness of this principle was relaxed. Not only were the subjects of the nations with which special treaties had been concluded on the part of the Roman Empire for mutual legal recognition held, upon the whole, to

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<sup>1</sup> So, too, even in later times (L. 8, pr. D. *qui testamenta*, 28, 1), with exception of envoys. They, for example, test in foreign countries according to Roman law (L. 13, § 1, D. 28, 1).

be of full legal capacity, but so were almost all foreigners with whom Rome had a peaceable commercial intercourse.<sup>2</sup> This did not go so far as to set the foreigner on equal terms with the Roman citizen as regarded private rights and privileges, but the protection of Roman law was extended to them for all the purposes of trade intercourse. For the purposes of trade no principles of law were necessary but those which the Roman jurists indicated by the name of *Jus Gentium*, and these the Romans characterised as a law, "*Quod apud omnes gentes peræque custoditur*," so that it could never come into conflict with Roman law.

The rights of inheritance, the rights of family, and the acquisition of landed property (at least in Italy), continued to be denied to foreigners. The marriage of a Roman with a foreign woman was no valid marriage by Roman law; a foreigner could not inherit under a Roman testament, and even many forms of the transference of property (e.g., *mancipatio* and *in jure cessio*), were not applicable to the acquisition of property by strangers.<sup>3</sup>

Where a rule of law belonged to the *jus civile*, it needed either a special legislative enactment to make it applicable to the relations of Romans and foreigners, where the necessities of the case inevitably demanded such an application, or else the prætor, in the case of an enactment specially laid down by the legislature, and belonging therefore, no doubt, to the

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<sup>2</sup> See L. 5, § 2, D. *de captivis*, 49, 15. *In pace quoque postliminium datum est; nam si cum gente aliqua neque amicitiam, neque hospitium neque fœdus amicitiae causa factum habemus, hi hostis quidem non sunt; quod autem ex nostro ad eos pervenit, illorum fit . . . idemque est, si ab illis ad nos aliquid perveniat. . . .* Cf. Fœlix, i. p. 8.

<sup>3</sup> In the year 584 A.U.C. the right was specially granted to envoys from Gaul by the senate, to buy ten horses in Italy and to take them away with them. "*Denorum equorum eis commercium esset, educendique ex Italia potestas fieret*," Liv. xliii. 5; Puchta Instit. ii. § 197, not. b. It is a necessary inference that for themselves foreigners could not buy horses. Perhaps the meaning of the division of things into *res Mancipi* and *res nec Mancipi*, lay in this, that foreigners were excluded from acquiring the former. In the case of *res Mancipi*, *traditio*, which was open to foreigners, could not transfer the property, and *res Mancipi* were the very things which foreigners must have been forbidden at first to acquire. The fact that *res Mancipi* could be acquired by *in jure cessio* goes all the further to show that this is the true explanation, since this form of acquiring property was only known among Roman citizens.

*jus civile*, but at bottom merely the development of a principle of the *jus gentium*, created the fiction that the dispute was between Roman citizens. An instance of the former is to be found in the plebiscite of the year 561 A.U.C., which extended the provisions as to the legal rate of interest to loans from foreigners to Roman citizens (Liv. xxxv. 7); an instance of the second is the formula given in Gaius, iv. 37, for extending the punishment of theft to cases occurring between foreigners and Roman citizens.<sup>4</sup>

That the law of a foreign country should be applied in those cases where the legal relations of foreigners fell to be considered as an incidental point before a Roman tribunal, was the necessary result of any legal recognition of intercourse with foreigners. If it had been otherwise, and if the Roman, who acquired any chattel from a foreign country had had no appeal to the right that lay in the foreigner who was his author, trade even within the empire must have become uncertain. In the same way, in a suit where one phase of the dispute was as to the Roman law of citizenship, a question might incidentally arise as to the validity of a marriage concluded between foreigners, and this was determined even in a Roman tribunal by the law of the foreign country, in so far as it was of importance to determine it (Gaius, i. 92). All the rules of the Roman law that had reference to succession could only form matters of dispute between Roman citizens,<sup>5</sup> for there was no succession as between Romans and foreigners; again in a question of succession as between foreigners, a question that could only come before a Roman court as an incidental point, the law of the foreign country alone could be applied, if there was to be any recognition at all of succession as between foreigners. This is laid down by Ulpian, *Fragm.*, tit. xx. § 14, and by Gaius, iii. § 120, as applicable to the testaments of foreigners and to obligations transmitted by succession.

Thus, if we set aside a few isolated points, it remains doubtful how the Roman private law dealt with such questions as that of legal status and capacity to act in the case of

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<sup>4</sup> On the development of the *jus gentium*, see Puchta *Instit.* ii. § 83-85.

<sup>5</sup> See L. 6, § 2, D. 28, 5; L. 59, § 4, D. 28, 5; L. 1, C. 6, 24.

foreigners. But although direct evidence is not forthcoming, one may assume it as certain that the decision of these questions would be determined by the law of the country to which the stranger belonged. Slavery, if it were lawful for a foreigner to bring slaves to Rome with him, or to take them away from Rome, would be treated by the courts precisely like property in other moveable goods. The other principles of Roman law that touch the question of legal status and capacity to act were closely connected with the law of the family, and were in reality, except in cases of natural incapacity (which was also recognised by the *jus gentium*), merely consequences of the position of the individual in the family. The law of the family, however, was regarded as a law peculiar to each nation, and not capable of being communicated to strangers. But where in any particular suit a gross miscarriage of justice might occur, it was in the power of the prætor to further justice by an adaptation of the formula administered by him to the circumstances of the case.

The private law of property and rights was accordingly treated by Romans and strangers as a special part of the law of status, which followed a Roman wherever he went (Wächter, i. § 242). This fact is specially clear in the days of the Empire, when Roman citizens lived in all quarters of its dominions, and observed their own law without regarding the place where they dwelt. When in later times Caracalla gave rights of Roman citizenship to all the free inhabitants in the empire, the legal position of all became the same.<sup>6</sup>

The object of the books of law compiled under Justinian

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<sup>6</sup> It is Savigny's opinion (viii. § 357, Guthrie, p. 120), that the right of Roman citizenship which every citizen of a *municipium* had, besides his own native rights of citizenship, had nothing to do with determining his personal rights, but that in determining these no regard was paid except to the law of his own home. This view is met by the prominent meaning given to Roman citizenship, as regarded private rights and privileges, in the latter days of the Empire, when the established political rights of the individual were not much discussed, and is completely answered by the well known object of Caracalla's decree—viz., to draw from foreigners as well as Romans the taxes levied on succession. But how could the Roman law of succession have been extended to the citizens of the *municipia*, if the law of the family and their legal and commercial capacity were not regulated among them by Roman law? According to Savigny's view, cases of conflict between the laws of the different

was so practical that they could hardly take up the treatment of a subject so antiquated as the discussions on the conflict of laws that might be discovered in the writings of the classical jurists; and besides, by reason of the great centralisation of the Roman Empire, and the maintenance and preservation of the Roman private law as a privilege of Roman citizens, in contrast to those who had not all the rights of freemen, the *Dediticii* and the *Latini Juniani*, no customary laws had established themselves except in a few unimportant matters arising out of the interpretation of commercial instruments. In cases of this kind, however, matters could easily be adjusted with the aid of the principle of *bona fides*, which in later times was so much extended.

On the one hand, then, this is an explanation of the scantiness of authority upon the conflict of laws in the law books of Justinian; and on the other, it follows that where in the authorities there is a possibility of a double interpretation of any passage, where there is a doubt as to its meaning, one must give the preference to that explanation which does not assign the disputed passage to our subject, just because cases of that kind are not so likely to occur.

For instance, the following passages are assigned to the subject of the conflict of laws:—

(1.) L. 34, D. *de div. reg. jur.*, 50, 17. The question discussed here is as to the interpretation of a contract. The passage says, that you must have recourse to the expressed wishes of the parties, and if these are not clearly expressed, that then you must determine the question according to the custom of the locality in which the bargain was made. There is no reference to the form of the contract,<sup>7</sup> or to the essentials of the legal instrument, as has been frequently maintained;<sup>8</sup> the passage takes for granted that the instrument

States and the law of Rome must have been most numerous, and the want of any decisions of questions of the kind in the authorities, noticed by Savigny himself, would be incomprehensible. A direct authority against Savigny, and in support of the view given above, is the fact recorded by Gellius, N. A. iv. c. 4, that when the right of Roman citizenship was given to the Latin towns, they lost their own marriage laws.

<sup>7</sup> See Wächter, i. p. 248; Savigny, § 356, Guthrie, pp. 117-18.

<sup>8</sup> See, e.g. Glück, Pand. i. p. 290.

is valid. There is more to be said for the view which makes it a case of conflict between some particular customary law and the meaning of a legal instrument ; but, as Savigny has plainly pointed out,<sup>9</sup> this explanation is highly improbable : if the question were about a contract concluded in one place, and to be carried out in another, the general expression, "*in regione in qua actum est negotium*," must almost inevitably have been misunderstood : for on this hypothesis it could not be determined whether "*actum est*" referred to the place where it was concluded or to the place where it was to be carried out. Taken in its natural sense, the passage refers to the common case, in which two men living in the same State conclude a contract that is to be carried out there.

(2.) The same holds good of L. 6, D. *de evictione*, 21, 1 ; L. 1, and L. 31, D. *de usur.*, 22, 1. (See on the latter passage Savigny, § 374, Guthrie, p. 257.) Other passages treat of the rules of jurisdiction within the Roman State ; and it is plain that if, for example, in L. 20, D. *de jurisdict.*, 2, 1, it is said "*extra territorium jus dicenti impune non paretur*," this can only be made to refer, as the second sentence of the passage demonstrates, to the native Roman judge. (See also L. 3, D. 1, 12 ; L. 16, D. *de off. proc.*, 1, 16 ; and also Wächter, i. p. 250.)

(3.) L. 65, D. *de judiciis*, 5, 1, which is by many authors (e.g. Hert. sect. 4, § 30, not. 8 ; Glück, Pand. xxv. p. 271 ; Thibaut, Pand., § 323) treated as referring to the regulation of the property of spouses according to the laws of their domicile, only speaks of the domicile as the place in which an action for recovery of the *Dos* can be brought (Savigny, § 370, Guthrie, p. 209).

(4.) L. 19 of the same title lays down that actions for debts due by one who has died must be brought against his heir in the place where his predecessor had his domicile : there is no reference to different laws of succession, among which the law of the predecessor's domicile is to prevail (Wächter, i. 250-51.) To take another instance, the rule that questions as to moveables are to be determined by the law of the domicile of their owner (Marius ad Jus. Lub.

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<sup>9</sup> § 372 and 374, Guthrie, p. 226 and 245.



Proleg. quæst. 6, n. 20 ; Hofæker, Principia jur. Rom. Germ., § 140) cannot be deduced from L. 32, D. 20, 1, *de pignor*, and L. 35, D. *de hered. instit.*, 28, 5. In the former passage, the point discussed is simply, What are the pertinents of any subject? in the second, What is to be the interpretation of a testament in which two heirs were named, one for *Res Italicæ* the other for *Res Provinciales* that belonged to their predecessor?

(5.) If these passages which treat directly of a conflict of laws are put out of account [*e.g.* L. 1, § 15, D. 25, 4 ; L. 3, § 6, D. *de testibus*, 22, 5, and L. 31, C. *de testam.*, 6, 23], all that are left are the passages in L. 9, C. 6, 23, *de testam.* ; L. 2, C. 6, 32, *quemadmodum test.*, L. 1, C. 8, 49, *de emancip.* The first and most plausible of these passages is referred by Wächter (i. § 24) to a case of conflict of laws, and, if this is assumed, would certainly enunciate the rule which, according to the previously cited authorities, is correct, that according to Roman law the form of a testament is regulated by the law of the domicile of the testator.

But, as Savigny notices (§ 382, Guthrie, p. 326), if the passage treated of a case of conflict, the words "*patricæ tuæ*" must have reference to the law of the domicile of the heiress, and this deliverance could not possibly be correct in law. It is therefore to be assumed that the heiress and the testator had the same domicile, and that in that domicile the testator had executed his testament.

The second passage lays down that testaments are opened and made public according to the custom of the place of opening. This enactment, in the first place, has nothing to do with the private law of property and obligations ; and in the second place, makes no allusion to any case of conflict between different laws.

The third passage treats of the rights of the *duumviri* in cities. Whether a ceremony of emancipation performed before them is or is not valid depends upon whether they have, by special enactment, received the right of "*legis actio*," and no further explanation is necessary. There is no discussion of a conflict between the laws of different cities, but merely of the different rights of officers of cities, depending, of course, on the provisions of the laws of these cities. (See Savigny, viii. § 382, Guthrie, p. 327.)

If, then, it be true that provisions as to the private law of property and obligations are not to be found in the law of Rome, it can very easily be understood that there is nothing forthcoming as to the relations of Roman tribunals to those of foreign States. In the days of the Empire, all the courts that existed within it from one end to another were under the supreme jurisdiction of the emperor; and those peoples who were not subject to the sway of Rome, belonged to so low a grade of civilisation, that questions of that nature could hardly arise.

Lastly, as regards criminal law, the want of information on this subject in the authorities is also explained by the complete mastery over the world attained by Rome in her later days.<sup>10</sup> This much is certain, and may be explained by the world-wide dominion of Rome, that every delict committed on Roman soil, unless when some foreign envoys took the responsibility for it upon themselves,<sup>11</sup> was punished by the courts of Rome, and before the *Forum delicti commissi*, which in later times came to be recognised everywhere.<sup>12</sup> (See particularly L. 3, D. *de off. præ.*, 1, 18.) The older enactments of the Roman law as to private prosecutions between Roman citizens and *Peregrini* (Gaius, iv. 37) were certainly in Gaius's time, when there was any serious charge involved, obsolete,<sup>13</sup> and were never regarded by officials in their administration of punishment.<sup>14</sup> The older treaties

<sup>10</sup> In more ancient times, up to the first century of the Republic, it was regularly provided, with regard to *Peregrini* with whose States the Romans had concluded treaties, that the trial should take place before the tribunal of the country to which the criminal belonged, although there were also instances of criminals being given up by the agency of the *Fetiales* to the State to which the injured party belonged (Rein., Criminal Recht der Römer, Leipzig, 1844, § 174).

<sup>11</sup> Rein., p. 179 *et seq.*

<sup>12</sup> Geib, Geschichte des Römischen Criminalprocessen, Leipzig, 1842, pp. 487-88. The *Forum originis* is not, however, unknown to Roman law, and it was in accordance with the republican pride of the older days of Rome up to the Empire, that more serious crimes committed by Romans could only be brought to judgment in Rome itself.

<sup>13</sup> As described above, there was a fiction that the *peregrinus* was "*Civis Romanus, si modo justum sit eam actionem etiam ad peregrinum extendi.*" Gaius, loc. cit.

<sup>14</sup> L. 3, D. *de off. præ.*, 1, 18. *Habet—imperium et adversus extraneos homines si quid manu commiserint—nec distinguitur inde sint.* See L. 7, § 2, D. *de captivis*, 49, 15; C. *ubi de crim.*, 3, 15. Nov. 69, c. 1; 134, c. 5.

in matters of criminal law concluded between Rome and other States, had much more of a political than a juristic character. There lay at the root of them the idea of the hold of the State over any of its subjects who had done a wrong to a foreigner in a foreign country: the State could discharge this hold by surrendering the guilty party to the State that had been wronged; but it also followed that if the foreign State did not claim the extradition of the criminal, he was not visited with any punishment in Rome (L. 17, D. *de legit.*, 50, 7). In later times, when the Roman Empire had become almost world-wide, there could not be much heard of the extradition of Roman citizens to foreign States; but on the other hand, even in these later days, there were still instances of foreigners being surrendered by foreign States (Kostlin, *System des Deutschen Strafrecht*, pp. 38-39; Witte, *Medit.*, p. 26; Rein, p. 172 *et seq.* On international law among other nations of antiquity, see Witte, p. 13 *et seq.*).

## B. THE MIDDLE AGES.

### § 3.

#### (1.) THE EARLIER MIDDLE AGES.

It is well known that a foreigner by the original Germanic law<sup>1</sup> was held, as he had by the old law of Rome also been held, to be outside its pale, a waif and a stray (*Wildfang oder biesterfrei*); and to enjoy its protection it was necessary for each individual to acquire rights for himself (Eichhorn, D. Privat Recht, § 75; Wächter, i. p. 253).

As a result of the conquests which the different German peoples, and especially the Franks, won in the times of the great national migration and immediately thereafter, this theory, in so far as those races which were bound up by the conquering people into one nation with themselves were concerned, disappeared. All the races that belonged to the Empire of the Franks were placed under that rule of law

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<sup>1</sup> The Russian law in the Middle Ages not only accorded foreigners a perfect equality with its own people in the eye of the law, but even gave them various advantages. On the Russian treaties concluded in the Middle Ages, see the interesting information given by F. Witte (*Die Rechtsverhältnisse der Ausländer in Russland*, pp. 4-22).

which in modern times is described as the system of personal laws, and which consisted in this, that every man was laid under the jurisdiction of the law of that race to which he belonged by descent. How this state of matters arose cannot be better described than in Savigny's words (History of Roman Law in the Middle Ages, Vol. I. p. 118):—

“The system of personal laws does not arise in the principle of humanity, for among the ancient Germans every stranger was originally looked upon as a waif or a stray (*Wildfang oder biesterfrei*). Again, so long as there are only one or two isolated foreigners to be found among each nation, as we must suppose to have been the case when trade was scanty, the want of any such arrangement is not likely to be felt. Besides, one can hardly conceive how such a system could in these circumstances arise; for who could have told the foreigner what his rights in a foreign country were? This system of personal law could not arise until the nations had been mixed up with each other in great masses by foreign conquests. If we assume this as its origin, the system of personal laws must have been adopted in all the Germanic States that were established on Roman soil, in the form at first of a double system of law—the law of the conquering race and the Roman law. In such a State, Germans of other races did not enjoy their own law. But when this State extended its conquests, and put other German races as well as the Romans under its sway, then the Germanic law that belonged to the conquered race obtained just as general a recognition in its dominions as the Roman law had done; and conversely in every country that fell under the yoke of a foreign invader, all the systems of law that were recognised by the conquering race were held good there also. After Italy was conquered by the Franks, the victors introduced all the various kinds of law that were recognised in their own country.”<sup>2</sup>

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<sup>2</sup> At the same time, it is quite possible that by this time in the interior of Germany these personal rights were recognised among peoples who dwelt side by side, and especially where there was some kinship. [A similar system now prevails in British India; cf. Westlake on Private International Law, p. 11. The law there administered consists of:—(1) The enactments of the Indian Legislative Council; (2) the Statutes of the British Parliament applicable

It must not, however, be forgotten that this system of personal laws was founded on the theory that each different race within the bounds of the empire was a caste or status by itself. It was natural that the victors should set themselves above the vanquished, and look upon their own law as a peculiar privilege, which they would neither amalgamate with the law of the vanquished, nor share with them. The manner in which the legal relations between persons of different races were regarded is quite in accordance with this theory.

As a rule, every man, as has been remarked, lived by the law of the nation to which he belonged by descent, and the law of his father's nation of course ruled. The wife lived by the law of her husband's nation, for during the subsistence of the marriage she shared his status, and did not recover the law under which she was born till she became a widow; marriage was celebrated under the law of the husband's nation. Priests were under the law of Rome, for they passed over from the status to which they belonged by descent into the priestly status, to which for some time the Roman law had been appropriated.

As no one could capriciously change his own status, so it was forbidden to change the law under which one lived; there were, of course, instances in which the adoption of a law different from that in which one had been born was permitted.<sup>3</sup>

This theory of a law of status is the explanation of the fact that, in an age when there was no sharp distinction between the real right in a thing and the personal claim to its delivery,<sup>4</sup> the defender as a rule pleaded his defence under

to India; (3) the Hindoo or Mohammedan laws of inheritance, status, and the like, in cases where Hindoos or Mohammedans are concerned; (4) the customary laws of particular castes and races. Where there is a conflict, the law of the defender is preferred, as stated in the text].

<sup>3</sup> On the so-called "*professio legis*," see Savigny, §§ 41, 42; and the true view in Hegel, *Geschichte der Städteverfassung von Italien*. Leipzig, 1847. I. p. 436.

<sup>4</sup> By the 139th article of the Edict of Theodoric, the competency of the court is fixed by the status of the accused himself, and not by that of his surety (Savigny, § 104). But according to other passages, in so far as the law of property and obligation is concerned, the law under which the author lived is taken into consideration (L. Burgund., tit. 55, § 2; *Capitulare 2, anni 819*, art. 8; Savigny, § 46).

his own system of law, since a personal obligation could be entered into by him in no other way than according to the law of his own status. It is, *e.g.*, certain that the church and those provincials who lived in the kingdom of the Franks under Roman law could defend themselves by pleading the thirty years' prescription, in spite of the fact that that was not recognised by the Franks; and it is also certain that in all cases where the validity of an act of one of the parties to the suit, or of some third person, was questioned, the law of the party who did the act in question ruled (Capit. 2, anni 819, c. 8); and accordingly, the form in which a man had to acquire anything was determined by his own law; the form in which a man had to transfer anything, which no doubt was concurrent with the acquisition by the other, was determined by the law of him who transferred.<sup>5</sup>

Again, the privilege of meeting any claim by tendering an oath was determined by the law of the person against whom the claim was made, and in the same way the penalty incurred for any crime was determined. Every man's succession was ruled by his own law; so that, if a Roman was to be the heir of a Longobardian by his last will, two or three witnesses were sufficient, but in the converse case seven were required.<sup>6</sup>

There was only one case which seemed to be an exception, and it also was a logical result of the theory of the law of status. This was the case of blood-money and composition, which were settled by the status of the person who had been killed or injured. Both of these, however, were simply the computation of the value of the dead man to his family or to his nation, and such a computation had to be settled by the place which each nation asserted for itself in the whole kingdom. The ruling nation could not possibly allow the value of the lives of its members to be determined by the law of any subject race, nor could it sanction a higher rate of blood-money for a member of the subject race than it approved for one of its own stock. In this way the foreign Salic law

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<sup>5</sup> The directions of both laws must therefore be observed on either side. Eichhorn, i. § 36, 5th ed.; Savigny, i. 46. On the provisions of the older Slav (Russia) law, see Witte, p. 11.

<sup>6</sup> Pipin, R. Capit., cap. 4, c. 46: "*Ut Romani successiones secundum illorum legem habeant.*"

prescribed to the Roman what was the amount of the composition he was entitled to receive.<sup>7</sup>

The sum of the matter, then, is this—putting out of view that *jus gentium* which was peculiar to these ancient times, and was identical with that known to Roman law,—that with this system of personal laws, by which a conflict of the laws of different nations was turned into a conflict of the laws of different classes in one nation, the questions of international law could not arise. Such a treatment of foreigners was satisfactory in those times, when commercial intercourse was not very involved, and when legal relations were so simple; it cannot, however, be denied that at the same time many questions of detail, as to which we have no precise information, may have remained unsettled. (Story, § 2 *ad fin.*)

#### § 4.

##### (2.) THE LATER MIDDLE AGES.

In the later Middle Ages the system of personal laws has disappeared.<sup>1</sup> This change is explained as due to various circumstances. Savigny (History, i. § 49, p. 180 *et seq.*) explains it as due to the feudal system and bondage. These changed the nation for the most part, if not entirely, from a body of race communities into a body of feudal retainers and bondagers. In the former state the law that prevailed was the law of these races; in the new state it was the law of service—a law that drew most of its provisions from the laws of the different races, but no longer made any distinction on account of differences in descent.

Eichhorn again (D. Rechtsgesch, i. § 46, note 2) finds the root of the system of territorial law in the voluntary association of men in burghal communities. No doubt both of these contributed to the disappearance of the system of personal laws, but neither will furnish a complete explanation of the

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<sup>7</sup> See Savigny's History, i. § 47.

<sup>1</sup> The jurists of the Middle Ages regularly choose the discussion of the binding power of statutes as the proper place to treat of this subject. The later commentators treated Roman law as universal, and therefore held that every other law was a special deviation from it—statutum. This way of treating the subject has had an important, and, to a certain extent, lasting influence on the treatment of international law, as we shall have occasion to remark.

change. Both prove too much; for they prove this, that foreign laws were no longer applied by courts of justice, since the foundation of both theories is, that the old legal doctrine was so seldom invoked that it disappeared. It is, however, well known that even in the later Middle Ages there were often debates before the tribunals on the application of the laws of foreign countries, and this fact suggests for our consideration, before we attempt to discover an explanation of the change, the question, What really was the state of the law on these matters in the later period?

One generally assumes (cf. Wächter, i. p. 253; Foelix i. § 5) that the principle of territorialism lies in the application of the laws of a State to all persons and things that happen to be within its limits. But even at the end of the Middle Ages there was no thought of a territorial law of that kind.

If passages such as the notes of the commentators on L. 1, C. de S. Trin. i. 1, "*Quod si Boniensis conveniatur Mutinæ, non debet judicari secundum Statuta Mutinæ, quibus non subest*"; or Durand, Spec. Juris, Lib. iv. pars. 1; *De constitutionibus*, Rubr. No. 5, and a great number of others,<sup>2</sup> are consulted, it will be seen that the idea of subjecting foreigners in all circumstances to the law of the country was far from being familiar even in the latest days of the Middle Ages. All the discussions of the commentators proceed directly upon this proposition—viz., that a statute is binding only upon subjects of the State, and it frequently happens that discussions on the question as to whether a statute is binding on the clergy are set alongside of the question as to the conflict of the laws of different States.<sup>3</sup> In fact, towards the close of the Middle Ages the theory which in later days has been called the theory of Personal, Real, and Mixed Statutes had begun to prevail.

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<sup>2</sup> e.g. Jason Mayn, *ad locum supra citatum*, No. 17; Albericus de Rosate *de statutis*, Lib. i. q. 7; Petri Ravennatis, *tractatus de statutis*, sect. 3, § 36; Albert Bruni, *tractatus de statutis*, art. 6, § 2; Rochus Curtius, in Cap., *cum tanto de consuetudine*, sect. ix. § 1 et seq.; Barthol. de Saliceto, in Leg. 1, C. de S. Trin.

<sup>3</sup> See Albericus de Rosate, *de stat.*, Lib. ii. q. 2, §§ 7, 10, 15; Petr. Ravenn., *de statut.*, sect. 2, § 51 et seq.



A distinction is drawn between statutes that apply to persons and those that apply to things: if to persons, then the operation of such a statute cannot be extended to strangers, or, to use the common expression, *Forenses*; and of course the *Subditus*, even while he may be in a foreign land, is still constantly subject to the laws of his home, unless these laws have a mere local application—as, for example, corn laws, laws as to exports and imports, and other police regulations. But if the statute refers to a thing, the laws of the place where the thing is situated must be applied; it being understood that this rule is applicable only in the case of immoveable things, since questions as to moveables are determined by the laws of the place in which the owner or the possessor<sup>4</sup> has his residence. At last it came to be recognised that strangers might subject themselves to the laws of a foreign country by virtue of acts done by them there, either by concluding contracts or committing delicts.<sup>5</sup> This theory seems to correspond completely with the manner in which the governing body or sovereignty of the different States developed itself in the Middle Ages.

The leading idea, which prevailed at the time of the Karlings, and long afterwards existed in theory, was that of a world-wide empire of the pope and the emperor—the former bearing sway in spiritual, the latter in temporal matters.<sup>6</sup> The privilege of legislation, which was claimed by other authorities, rested upon autonomy conferred by the pope and the emperor, and might be either the autonomy of a great landholder or of a free community. The former prescribed to his vassals and bondagers the manner in which they were to render services to him, and to succeed to the land which they held of him; the latter combined to lay down regulations for the exercise of their trades, and provided in the

<sup>4</sup> On this point, and generally on the extension of this doctrine, there is very great obscurity. Cf. §§ 59, 60 *infra*.

<sup>5</sup> Cf. Bartolus in *Cod. ad loc. sup. cit. de S. Trin.*, Bald. Perus. *Tract. de statutis* in the *Tractatus illustr. Tetorum Venetiis*, 1588, tom. ii. fol. 86; Albericus de Rosate, *Lib. ii. q. 1*; Bald. Ubald, in *loc. cit. de S. Trinit.*

<sup>6</sup> e.g. Barthol. de Saliceto on the passage of the Code already quoted, *de S. Trin.*, No. 3; Bald. Ubald, same passage, No. 20; Lanfranc de Oriano, *De interpretatione Stat.*, in the *Tract. ill. Illt.* fol. 391, p. 2; Jason Mayn, in *Cod. De S. Trin.*; Bartolus, in *Dig. Nov.*, L. 24, *de captivis*.

same way for the occupation of the land that belonged to them. In both cases the means of keeping these independent legislatures in force were supplied by the jurisdiction that was conferred upon them, and where such a jurisdiction, generally associated with a separate territory, was wanting—as for instance in the case of the different commercial guilds in cities—then these independent legislative powers could only be made good to a very limited extent.

Nothing, accordingly, could be more natural than to confine the operation of the legislative authority to the dependents of the great landholder, or to the persons who belonged to the free community, and to the land held by such a community. This arrangement would no doubt derive support from the state of matters that had formerly prevailed, according to which, by the system of personal laws, the foreigner always retained the peculiar law of his own home, even in the territory of another race, and the law of that race on the other hand was not extended so as to affect foreigners. Again, however, the acquisition of real property was associated either with full subjection to the feudal superior or overlord, or with the undertaking of some special duties.<sup>7</sup> An arrangement such as this must necessarily have given rise to the view that foreigners, in so far as the acquisition or occupation of real property was concerned, should be subjected to the laws of the country where these lay.<sup>8</sup>

The greatest difficulty lay in subjecting foreigners to the laws that had to do with contracts and delicts; but as the sovereignty of States was more fully developed, and trade became more complicated, both became necessary, and men availed themselves for this purpose of a fiction of voluntary submission to the laws of another country, notwithstanding that such a fiction is, at the best, applicable in the former class of cases only.

On this theory of the later Middle Ages all the authorities may be said to be at one: this principle is adopted as one that cannot be gainsaid—viz., that the lawgiver can lay down

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<sup>7</sup> Cf. Wetzell, *Civil Process*, § 40, not. 16, 26, 33.

<sup>8</sup> The exclusive force of the *Forum rei sitæ*, which was a peculiarity of the older law of Germany, and has often since that time been adopted, was, in this view, of great importance (Wetzell, § 41, not. 46-49).

rules only for his own subjects, and only in relation to the land that belongs to his own territory ; but in these cases he has an exclusive right of legislation. It is, however, matter of dispute which laws are laws of the person, and which again are laws that concern things, and consequently in what cases the law of the domicile or the law of the place where the thing is situated is to be applied. Then there were developed the rules, which we shall have afterwards to discuss more narrowly, that moveables follow the law to which the person of their owner is subject, and that the form of any legal transaction must be determined by the laws that are recognised in the place where that transaction takes place. (*"Mobilia personam sequuntur,"* or *"Mobilia ossibus in-hærent,"* and *Locus regit actum.*<sup>9</sup>)

The last rule in particular, as it may often bear some reference to the substance of the legal transactions, gives rise to the introduction of a third class of statutes, *Statuta mixta*,<sup>10</sup> although this name, and these technical descriptions of statutes as *"personalia"* and *"realia,"* are first made use of in later times in the sixteenth century, after the days of Molinæus, Argentæus, and others.

It was the verbal construction of the statute that, in the Middle Ages as a rule, and in later times very frequently, supplied the means of determining in cases where an off-hand decision could not be pronounced, whether this or that law applied to persons or to things, and whether, therefore, it was to be held to apply outside the territory, but only to native-born subjects, or to be confined to its own country, but applied there to natives and to foreigners alike.

It is well known that Bartolus decided the controversy as to whether a statute, which provided that the eldest son should succeed to his father's whole estate, had the former or the later scope, by inquiring whether the law said *"primogenitus succedat"* or *"immobilia veniant ad primogenitum;"* in the former case, the statute under consideration was to be held to be one that dealt with persons, in the latter, one that dealt

<sup>9</sup> Cf. e.g. B. Barthol. de Saliceto ad C. i. 1 ; *De. S. Trin.*, No. 14.

<sup>10</sup> On *statuta mixta*, see especially in later days Argentæus, *Comm. ad Britt. leges*, art. 218.

with things (*Bartolus ad loc cit. 1. Cod. De Summa Trinitate*).

And just as little can it be safely assumed that a particular statute will not apply to foreigners on the authority of that often-cited maxim, that no statute can create or destroy legal capacity in a foreigner,<sup>11</sup> a maxim which is generally introduced with reference to the capacity of minors in a foreign country. For nothing, for instance, is more certain than that a statute which excludes foreigners from the acquisition of land, is intended to be applied to foreigners ; and yet such a statute might easily be considered as imposing upon foreigners an incapacity to exercise certain modes of acquisition. Many points, no doubt, were determined by a *consensus* of authorities, as, for instance, the legal capacity of minors, and subsequently the question according to what laws the form of a testament was to be ruled.

We shall discuss the views of international criminal law that were taken in the later Middle Ages in a separate section : these views have continued their influence, at least in Germany, up to the beginning of the present century, and it will therefore be best to treat of them in immediate connection with the theories which are still entertained.

The canon law was from its nature not in a position to lay down any propositions upon private international law : it is the unity of the Church and the subordination of all to one supreme power, that constitute its chief features. Isolated provisions<sup>12</sup> that seem to tend in this direction, are merely ordinances of the supreme ecclesiastical authority with reference to the warrants and the competency of subordinate officials. Of course, discussions have often taken place upon these passages, just as upon the passage of the Roman law we have so often mentioned. The passage<sup>13</sup> of which most use is made expressly leaves the laws of the different territories out of sight, and decides the validity of a marriage by canon law alone.<sup>14</sup>

<sup>11</sup> Cf. *e.g.* Bald. Ubald. in *loc. cit. de Summâ Trinitate*, No. 57.

<sup>12</sup> Cf. *e.g.* Clem. 2, *de sent.*, 2, 11, C. 2, *de constit.*, in vi. 1, 2.

<sup>13</sup> C. 1, x. *de spons.*, 4, 1.

<sup>14</sup> Cf. Savigny, § 382, Guthrie, p. 327 ; Schöffner, p. 18.

## C. MODERN TIMES UP TO THE BEGINNING OF THE NINETEENTH CENTURY.

## § 5.

There is little difference between the views of the sixteenth, seventeenth, and eighteenth centuries and those of the Middle Ages. The theory of *statuta personalia*, *realia*, and *mixta* (the last of which was not recognised by all writers), was, as we have shown, involved in the views of the later commentators and the Italian jurists of the Middle Ages. This theory now for the first time acquired a distinct technical name.

But when the idea of an universal supremacy in the pope and the emperor was lost, and the different German and Italian territories, formerly under the sway of a higher authority, began, towards the end of the Middle Ages, to acquire independence in greater and greater degree, when the legislative authority rested, not upon the autonomy of the great landholder or of the free community, but upon a State system that bore sway in some territory that was independent of every other outside itself, the doctrines of law had to be made to correspond to this new face of things. This was attained in great measure, first, by the attempt that was made to regard the new theory as a necessary deduction from the limitations to a particular territory now imposed on the jurisdiction of each State, and the misapplication of maxims of the Roman law that confined the jurisdiction of a judge to a particular limit; and secondly, and more correctly, by regarding the application of foreign laws as a concession by the native legislative power, with this result, that all persons who happened to be for the time in any particular country, although they might merely be passing through it, yet, so long as they were there, were completely subject to the legislative and executive authority of that country.

Both views—of which the first is represented by such men as Argentré and Hert,<sup>1</sup> the second by Huber and John Voet—are introduced under the most various modifications, and are frequently treated together by the same writers, accord-

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<sup>1</sup> Hertius, it is true, as far as the terms are concerned, throws aside the division into *Statuta personalia*, *realia*, and *mixta*; his views, however, really contain precisely the same theory. Cf. Wächter, i. p. 281.

ing as the import of the *statutum personale* and *reale* is determined<sup>2</sup> either by its subject—*i.e.*, on the consideration whether the statute has reference to a person or a thing—or by its operation—*i.e.*, on the consideration whether it is to be applied beyond the territory for which it was made, or only within that limit. Sometimes both definitions are taken together. The definition of *statuta mixta* seems to be the least firmly fixed of all. Some understand by the term the statutes that have to do with legal acts; some the statutes that deal with both persons and things; while others again interpret them to mean statutes that have reference to the forms of legal acts (Argentr., No. 16, 22. Cf. J. Voet, §§ 2-4.)

Particular cases, too, are narrowly discussed. The works of Rodenburg, John Voet, and the more recent writings of Boullenois and Bouheir, supply a rich and subtle body of casuistry; and it may be remarked that on many isolated points these authors, in so far as they have the same particular system of law most closely under their observation, draw harmonious conclusions—as for instance, with regard to the law of succession, the jurists of the north of France, who take as the foundation of their discussions the old French law of “*Coutumes*,” which is at bottom pure German law; and, again, the authors belonging to the Netherlands, who spend their labours more assiduously upon the law of the property of married persons. We shall hereafter take the opportunity of using this *consensus* of jurists, which has frequently been recognised, to support our own point of view, and occasionally employ it as a proof of the existence of a consuetudinary law.

It is instructive to observe that neither of these theories—neither that which derived the limitation of the application of statutes to native subjects and to immoveables situated in the country from the exclusive character of the government of each State, nor that which extended the authority of statutes *de jure* to all persons and things found within the territory, and could only explain the undeniable exceptions to this rule by considerations of *comitas* or neighbourly intercourse—could serve as a foundation for

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<sup>2</sup> See upon these definitions, P. Voet, *De Statutis*, cap. 2, No. 3.

comprehensive principles to regulate the conflict of laws. The former is in open contradiction to that which confines the operation of laws to a particular local limit. Another method of reconciling the theory of personal statutes with the territorial theory, in this sense, that now the former and now the latter is to be entirely left out of consideration, can hardly be thought of; for the territorial principle plainly denies that any person can be accompanied into a foreign country by the law of his native place. This territorial principle—or, as the custom was, with regard to Roman law, to express it, the principle “*extra territorium jus dicenti impune non paretur*”—is only employed as a shorthand solution of difficulties suggested by the theory of personal statutes, or in order to supply a principle which it was considered necessary to postulate, but which could not be established in any other way.

The second theory, which sets up as the source of the application of foreign laws a voluntary concession by the supreme authority of the State, will disappear into capricious determinations if it is to take this concession purely as a favour and an act of friendship shown to the foreign country. It may easily be seen, in the writings of the different adherents of this school, to what a length may be carried the axiom that foreign laws are not to be allowed to prejudice our own, or to operate disadvantageously to our citizens and our State. That axiom is one by means of which an impassable limit can be assigned to “*comitas* ;” and the only question that remains is, whether this limit, if narrowly observed, does not destroy altogether the sphere for the application of foreign laws, or, if it cannot practically be destroyed, shows it to be purely capricious.

With these two leading principles others are connected, now in one way, now in another; for example, statutes are divided into *favorabilia* and *odiosa*, the latter being confined in their operation to their own territory, the former being allowed the like effect beyond it.<sup>3</sup> But every regulation of private law can be ranked under one of these categories as well as under the other.

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<sup>3</sup> Barthol. de Saliceto, and after his time others, *e.g. ad consult. Lunenburgenses*, c. 9.

A statute by which women are excluded from succession to land by male relations is obviously *odiosum* for the women, but *favorabile* for the men ; and if a statute gives the rights of full age on attainment of the age of twenty-one, it is *favorabile* in comparison with the common law, in so far as people of full age can do many acts which minors have not the capacity to do, but it is *odiosum* in so far as it withdraws the rights of minority on the close of the twenty-first year.<sup>4</sup> What is favourable to him upon whom any right is conferred, seems to be unfavourable to him who is bound to respect or to satisfy the legal right so created.

Other writers reject the division into *statuta personalia*, *realia*, and *mixta*, but follow the principles of the division, as Heinrich v. Cocceii, Hert, and Hofæker. Their starting-point is, that persons are subject to the laws of their native country, things to the laws of the place where they are situated, and acts to the laws of the place where they are entered upon. The distinction is only a nominal one.

If one puts out of sight these subordinate differences, the object for which the writers of this period strive is this : to discover the principle of distinction between various kinds of statutes. It is obvious to them that there is a threefold manner of subjection to the law of any territory : first, in so far as the individual has his domicile there ; secondly, in so far as he possesses property there ; and thirdly, in so far as he enters upon transactions there. Thereupon it seems to them, at the first glance, that there is nothing more natural than to make the individual subject to the laws of his home, the property to the laws of the place where it is situated, and the transaction to the laws of the place in which it is entered upon. The difficulty, however, lies here : that a law which deals with the legal capacity of the individual and his status, prescribes at the same time the conditions under which he may acquire and convey property, and enter upon legal transactions. To solve their doubts, some, such as Burgundus and D'Aguesseau, wished to take as the rule for distinction the words of the statute, in the same way as Bartolus, who has been so much blamed for it, had already done.<sup>5</sup>

<sup>4</sup> Cf. Schäffner, § 16.

<sup>5</sup> Burgundus, i. 1, n. 6. *Necesse erit statutum, quo minores immobilia*



Others have recourse to considerations of practical utility or to authorities; and others, a very small minority, make it their object to ascertain the true scope of the statute. Duplessis takes this course (Consult. 26, t. ii. of his works, pp. 151-52), although, upon the whole, he is inclined to follow the more superficial definition of D'Argentré: "*Une attention exacte sur la nature, l'objet et le motif de chaque statut en particulier est souvent le moyen le plus propre pour déterminer si c'est la réalité ou la personnalité qui y domine; s'il suit la personne ou s'il est renfermé dans les bornes du territoire.*" And again (Consult. 47, t. ii. p. 299): "*Ce qui caractérise un statut personnel, c'est quand il concerne directement l'intérêt de la personne, et non pas la conservation de la chose, si ce n'est d'une manière subordonnée et relative à la personne, il faut, que le motif, qui l'a introduit soit fondé principalement sur la condition des personnes pour lesquelles il est fait.*"

It is to be noted that a decisive importance is attributed to the motive of the statute, and whether it has been enacted with a view to persons or to property; and, in isolated instances, a distinction of the same kind is to be found taken by other authors, although it is not at all in keeping with the principles which they postulate. D'Argentré, for instance, treats the question, whether the prohibition of donations

*alienare vetantur, non personæ, sed rebus ipsis injungi—conditio minoris non est in dispositione, sed tantum in enunciatione.*

D'Aguesseau, *Œuvres*, T. V. S., p. 281. *Le véritable principe en cette matière est, qu'il faut distinguer, si le statut a directement les biens pour objet,—ou si au contraire, toute l'attention de la loi s'est portée vers la personne, pour décider en général de son habilité ou de sa capacité générale et absolue.* This view is quite distinct; but to demonstrate its falsity more clearly, take the version of the author of the French Repertory of Jurisprudence. *Voce Autorisation Maritale*, sect. 10, No. 2: "*Pour juger, si un statut est réel ou personnel, il ne faut pas en considérer les effets éloignés, les conséquences ultérieures: autrement comme il n'y a pas de statut personnel, qui ne produise un effet quelconque par rapport aux biens, ni de statut réel qui n'agisse par contre-coup sur les personnes, il faudrait dire, qu'il n'y ait point de statut, qui ne soit pas tout à la fois et personnel et réel; ce qui serait absurde et tendrait à établir une guerre ouverte entre les coutumes: que faut il donc faire? Il faut s'attacher à l'objet principal, direct et immédiat de la loi et oublier ses effets.*" So the thing to be considered is, not the general scope of the statute, but the subject with which its letter deals.

between married persons is a real or a personal law, pronouncing it to be the latter so long as he is engaged with the prohibition of the Roman law, and the former in connection with the corresponding title of the "*Coutumes*." He says : "*Finis prohibendarum donationum conjugalium habet personales quasdam considerationes, quod leges 1 and 2 D. de donat. inter virum et uxorem indicant, et quia diversi generis donationibus non eadem leges positæ sunt, sed Consuetudinariæ causæ de prohibendis his sumuntur potius a rebus, gentili pecunia et propagatione familiarum, quæ res reales sunt, non ut illæ juris Romani a personis sumtæ—cum dispositio prohibitiva res potius respicit et hæredum æternam in immobilibus successionem.*"

This distinction between the prohibition of these donations in Roman law, which had for its object the purity of the married life, and the prohibition in German law of the alienation of the family property by a husband in favour of his wife, touches the true point ; and it is illustrated by the fact that all the writers who take German law as the starting-point from which to discuss the conflict of laws, treat this prohibition as a real statute, while those who are more familiar with Roman law regard it as personal.

If the rules laid down by the adherents of the theory of *statuta personalia*, *realia*, and *mixta* are examined in detail, they are found to correspond in a very few points, and this correspondence is, upon closer examination, often found to be merely apparent. There is no real substantial ground of distinction to take up. It is quite true that a conflict of laws occurs, because persons by virtue of their domicile belong to a particular jurisdiction ; that things, again, belong to a jurisdiction determined by their local situation ; and acts seem to stand in what looks like a natural and close relation to the law that is recognised in the place where they are entered upon. But granting so much, all that has been disclosed is the state of facts in which the rules of international law find their origin, the principle of law that is to give rise to these rules has not been reached. The real and substantial principle can only be found by looking back upon the nature of the connection between a person, a thing, and an act, on the one side, and a State and its laws, on the other.

It was thought sufficient, in the various cases that occurred, to postulate the application of the laws of the domicile of the person, or of the local situation of the thing, or of the place where the act was done. And in this way not only did the adherents of this theory contradict one another, but as their rules—although common-sense often led them to sound conclusions—were at bottom quite arbitrary, each author often fell into plain contradictions of his own determinations, as Wächter has clearly pointed out.<sup>6</sup>

It will be useful to subject the different authors of this period to a short review. We shall at present not go further into details than is necessary to exhibit the true meaning of the general principles adopted by each author; the details will be considered subsequently when we come to discuss particular chapters of law. The technical expressions used by authors in this subject have so many different meanings, that the points of agreement and of difference of the various authors will be made plainer to the reader by this separate treatment of them, than if the adherents of each doctrine were grouped together as that doctrine is taken up.

## § 6.

### (1.) U. C. B. D'ARGENTRÉ.

D'Argentré treats of the conflict of laws in his Commentary upon the Customs of Brittany, in connection with the 218th article of these customs, which runs as follows:—

*“Toute personne pourvue de sens peut donner le tiers de son héritage à autres qu'à ses hoirs, au cas qu'elle ne ferait pas fraude contre ses hoirs.”*

Our author inquires, in his commentary on this article, whether the same rule is to be applied to real property in another country belonging to a Breton.

The rules of the “*Coutumes de Bretagne*” are the rules which Argentré has exclusively in view in the course of his discussion of the conflict of laws, and these consist for the most part of rules of the older German law or of feudal law;<sup>1</sup>

<sup>6</sup> Wächter, i. § 270; Savigny, System viii. § 361, Guthrie, p. 142.

<sup>1</sup> For example, as a rule, debts attach only to the moveable property that belongs to the estate of a deceased person (Arg. gl. 5, ad. Art. 219; Art. 561,

it follows, therefore, that Argentré's conclusions can only be very cautiously applied to the rules and institutes of common law. But if one has the skill to discriminate between the institutes of German law, which are especially in his view, and these more general principles, the accuracy of his conclusions on different isolated points will, in spite of the falsity that often affects his premises, be easily appreciated. According to Argentré, every legal relation of immoveables is determined by real statutes, the *lex rei sitæ*; but every rule which on the whole affects the person is a personal statute, and can only be applied in accordance with the law of that person's domicile. Where the question is as to the competency or incompetency of a person to perform a particular act, the statute there is a *statutum mixtum*, which is treated by Argentré just as a real statute. This definition, and the conclusion which he founds thereon, are undoubtedly general rules drawn by him from the particular case that is then under his notice—viz., the obligation, drawn from German law and found in Brittany, upon married persons to bestow their property upon each other for the benefit of their next heirs. At the same time, Argentré follows the rule, "*Mobilia ossibus inhaerent*" (No. 31), and applies to moveables the rules of law that hold good in the domicile of the owner.

We can trace the origin of this theory in the way previously indicated. The legislator of the domicile of any person can, says Argentré, make what provisions he pleases for that person, and, on account of the character so imposed upon him, that power of the legislature follows that person wherever he goes; on the other hand, however, the legislator can make no rules for immoveables which are not in his territory; and from this principle Argentré goes on to infer that, if a statute provides that a donation shall only be good to the extent of one-third of the donor's property, real property in a foreign country can never be taken into account in computing this third, because the legislator had neither the intention nor the power of making law for anything but immoveables situated in his own country.

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gl. 1, c.); the title of heir infers no universal succession (Art. 617-18); and in the Gloss. to Art. 277, No. 4, it is said: "*Nam præsumptio, immo necessitas veritatis habet, quod omnia feudalìa sunt in Britannia.*"

It has already been remarked that the theory of personal and real statutes by no means follows from the principles which Argentré assumes (p. 28); it is obvious that it entirely fails to supply a principle for the division into *statuta realia*, *personalia*, and *mixta*, the last of which are simply treated as real statutes. One cannot help, however, admiring the fine practical sense with which, as we shall see in the sequel, Argentré manages to hit the truth in particular cases in spite of his inadequate theory. Otherwise Argentré occupies himself mainly with the law of persons, the law of succession, and the law of married persons' property. Real rights and the law of contracts are scarcely touched by him.

## § 7.

### (2.) BURGUNDUS.

Burgundus is an adherent of the statute theory, which he rests on the same foundation as Argentré. It is not quite clear what general rule Burgundus means to lay down for distinguishing real and personal statutes. He rejects the well-known determination of Bartolus in reference to the conflict of a statute regulating the law of primogeniture with the common law, and prefers to direct his attention to considering whether the provisions of a statute with regard to the *conditio* of a person are laid down *in dispositione* or *in enunciatione*. According to other passages, again, every legal relation that imposes an obligation is a personal statute; a real statute is one that gives rise to a real action; and a mixed statute one which gives rise to both a personal and a real action. In so far, then, as real rights in immoveables are concerned,—the law as to moveables being determined by the domicile of the owner (i. §§ 40-43, p. 58, iv. § 26)—the law of the place where the thing is is the ruling law; but in so far as personal obligations are concerned, although these obligations may be in connection with immoveables, the law of the domicile of the person must be applied (i. § 6 *et seq.*) Thus there follows this strange practical result, that you may have a person who, by the law of his domicile, is a minor, with full power to grant a good conveyance of landed estate that is situated in another country by whose law he is of full

age, while he is not able to undertake a personal obligation to execute such a conveyance.<sup>1</sup>

To this Burgundus adds the proposition (iv. § 7), that the laws of the place where any legal transaction is carried out are the authority that must regulate the forms of the contract: "*Nam ut personæ, quamdiu in territorio versantur, ejusdem legibus sunt obnoxie, ita et actus personales—citra mentem consuetudinis iniri non possunt.*"

In two cases Burgundus reaches his determination by considering the scope of the statute: in treating of donation and succession between spouses, where he decides in agreement with Argentæus (i. No. 40); and again, subsequently, in some discussions upon the law of obligation (ii. Nos. 23, 24), where he attaches importance to the fact whether the statute was passed *in favorem debitoris* or *creditoris*. It is easy to see that this theory is entirely arbitrary and inconsequent. The distinction, however, between immediate real rights in a thing, and the personal obligations undertaken in respect thereof, is worth attention; although Burgundus makes far too extensive a use of it, as the instance given above of his opinion that the capacity of disposing of a thing depends upon the *lex rei sitæ* shows.

## § 8.

### (3.) RODENBURG.

Rodenburg, too, founds the theory of *statuta personalia*, *realia*, and *mixta* upon the proposition that the legislator cannot lay down rules for things that are situated in a foreign country, or for persons who are domiciled there (Tit. i. cap. 3, No. 1), although he is forced to admit that it is possible to lay down such rules indirectly (*l. c.* No. 5).<sup>2</sup> Personal statutes, according to Rodenburg's view, confer on the person a quality that adheres to him; otherwise, a man might be a minor in one place, and of full age in another.

<sup>1</sup> See, on the other hand, Abraham a Wesel, *ad Nov. Consuet.*, Ultraj., Art. 13, No. 25; Merlin, Rép. Vo. Majorité, § 5, *On ne conviendra jamais, comment une tradition faite sans titre et sans aucune cause peut être valable.*

<sup>2</sup> The result of this would be that, in the ultimate resort, the legislator would be able, by the force of his own enactment, to put his laws into operation beyond his own territory.

Rodenburg defines the *statutum mixtum* in the same way as Burgundus; but in the application of this definition he is very far from agreeing with him, interpreting the restrictions upon the alienation of a minor's estate by the *lex domicilii* of the minor, instead of referring them, like Burgundus, to the *lex rei sitæ*. Upon the whole, Rodenburg holds to the words of the statute—" *Quid in dispositionem statuti ceciderit*"—without caring to consider, "*quaratione cujusve personæ intuitu*," the law may have been enacted; but yet he has a strong argument upon the intention of the legislator, and on the question whether he had persons or things in view (Tit. ii. p. 2, cap. 4, § 5). In this connection, Rodenburg lays down the proposition, "*Mobilia personam sequuntur*" (Tit. ii. p. 1, cap. 2, § 1; ii. p. 1, cap. 5, § 16), but without fully realising the consequences of this maxim, as will appear on consulting the passage last cited.

Rodenburg's researches, which set out from a discussion of the rights of married persons, and are therefore principally directed to the questions of capacity, succession, and property of married persons, and have but little concern with the law of contracts, are yet sorely deficient, like those of Argentré and Burgundus, in a substantial and consecutive ground plan, although in many isolated points they are acute and subtle. For instance, Rodenburg carries out logically the distinction between personal and real grounds of action in the sphere of married persons' property, a distinction already made, no doubt, by Burgundus, but thrust too much into the foreground by him. The great collection of actual cases, in which the decisions of the law courts of France and the Netherlands are given, favourably distinguishes this work.

## § 9.

### (4.) P. VOET.

Voet's work upon the statutes deals with our subject in sections 4, 9, and 11.

Taking the division into *statuta personalia*, *realia*, and *mixta* as fundamental, he goes on to deduce from the independence of different territories this result—that a personal

statute, strictly construed, will not affect subjects of a State who are temporarily absent in another State ; while, at the same time, no legislator can lay down rules for foreigners who happen to be for a time in his dominions, as regards their essential characteristics—*i.e.*, their capacity or incapacity. From this it follows that the legal capacity of these foreigners is not to be determined either by our law or by the law of their home.

With Voet, upon the whole, a more accurate conception of the independence of different territories leads to complete confusion, so that his true meaning is in many cases hardly discoverable, and nothing is left to him at last, when juristic considerations are exhausted, but an appeal to the *humanitas* and *comitas* of other Powers. It may be conceded, however, that Voet very often hits the truth, but certainly not because of the grounds on which he relies, for these, on the contrary, may often be turned against him.

## § 10.

### (5.) HUBER.

With Huber, even more conspicuously than with Voet, the independence of different territories comes to the front. The laws of a State, as Huber lays down at the very outset of his inquiry, have no force except within that State ; but they are good there for all persons who are found within it. The strictness of this axiom is only modified by the friendly intercourse that exists among the different States, and by the *comitas* which they observe ; in consequence whereof, the application of foreign laws is permitted, in so far as it is not repugnant to the supremacy of the sovereign power in our State and the rights of our subjects.

According to Huber's view, it is consistent with these principles that the laws of the place where any legal transaction is entered upon should determine its validity, just as the qualities of persons, which are stamped upon them in the same way, should be determined by the law of their domicile, while all the legal relations of immoveables should be settled by the laws of the place where the thing is. In obedience to the last rule, Huber applies the *lex rei sitæ*, not only to



testate and intestate succession in immoveables, but even to contracts that have to do with immoveables.

It is plain that Huber's theory cannot be deduced from the principles which he postulates. The first principle has only a negative force, and the second, as it is understood by Huber, is no doubt well fitted to demonstrate the motives by which the application of foreign laws is, as a general rule, determined, but cannot supply any solution for individual problems.

The clearness and brevity with which Huber speaks give his work a notable advantage. Besides that, in his character of *Exsenator supremæ curiæ Frisiæ*, he communicates to his readers cases that have actually been decided.

## § 11.

### (6.) HERT.

All that needs to be said of Hert's theory has been said already. The validity of the *lex domicilii*, in relation to the status and capacity of persons, he attempts to establish upon the consideration that the sway of a State over foreigners is confined to the transactions they enter upon in its dominions, or to the immoveables which they possess there. Only, if the transactions of foreigners entered upon in our country are to be subject to the authority of our State, it is difficult to see how their persons are not also to be made subject to it while they remain in our State.

It is worth remarking that Hert (sect. iv. §§ 31, 32) introduces *jus naturale* to settle some cases; but it is not clear what he understands thereby as regards the rights of different territories.

## § 12.

### (7.) J. VOET.

J. Voet is conspicuous by a trenchant and logical adherence to the idea of an exclusive sovereign and legislative authority in each separate territory. He lays down that in strict law no appeal can be made in a foreign court to the *lex domicilii* as determining the status and capacity of a person. Voet is therefore of opinion that, except in so far

as special exceptions have been accorded by the free permission of the authority of the State, the judge, who can only carry out the will of his own State, must apply none but the law of his own country. He treats as such exceptions, sanctioned by long practice, the rules that moveables are regularly judged by the law of the domicile of the persons that own them, and the external forms of a legal transaction by the laws of the place where it is entered upon (§§ 11-15). Voet cannot therefore be charged with illegitimate deductions, but it may be asked whether it is correct to say that all theories are insufficient, and that it is necessary to appeal to such an universal practice. At the same time, the exception, which Voet in the ultimate results of his theory wishes to introduce by the assumption that, where no prohibitory laws stand in the way, the application of foreign law to any contract on which they may be entering depends upon the will of the parties themselves, is, from his own point of view, improper; for, by his own theory, with the exception of the special cases sanctioned by usage, all laws are prohibitory, and if they permit in this or that legal relation any compacts that parties may desire, then, in the case of such a bargain, we are no longer concerned with the solution of a conflict of laws, but with the interpretation of the will of the parties. Voet, however, confounds the immediate statutory consequences of a transaction with the case of a tacit agreement, an inexact manner of thought which enables him to escape from some consequences of his principles; as, for instance, in the subject of the property of married persons, in which he bases the general validity of the *lex domicilii* of the spouses upon a tacit agreement. Besides the chapter specially devoted to the conflict of laws, Voet, in the other parts of his Commentary on the Pandects, gives many other judgments on different points which certainly are often irreconcilable with the exclusion of foreign laws which he postulates, but are at the same time conspicuous for the clearness and precision peculiar to this writer, and for his fine practical instinct.

## § 13.

## (8.) BOUHIER.

The theory of real and personal statutes assumes a peculiar shape in Bouhier's works.

While he assigns as grounds for the application of foreign laws the goodwill that different nations bear to one another, and the general benefits that result from it, he lays down the following rules :—

1. Every statute which deals with incorporeal and unassignable rights is personal ; that is to say, is valid beyond the territory for which it is enacted.

2. The same property is to be ascribed to a statute which rests upon a tacit or an express agreement of parties, and also

3. To a statute which, out of considerations of public policy, lays some restraint upon all persons who are domiciled in the dominions of the State.

4. Lastly, every statute is personal to the effect described, which enacts formalities for a legal instrument (chap. 23, Nos. 14-39). All other statutes Bouhier regards as real, and only valid within the territory for which they are made ; but to this he has to add (chap. 23, Nos. 90, 91)—

(a.) The personal statute, which is permissive, is to be subordinate to the real statute, which forbids.

(b.) The personal statute of the domicile is to be preferred to the personal statute of the place where the thing is situated.

One can at once discover that the leading rules quoted above are only abstractions from particular cases, and are not universally applied even by Bouhier. For instance, by the first rule unassignable servitudes over heritage would belong to the class of personal statutes, although Bouhier himself (chap. 29, No. 29) admits that the reverse is true. In spite of this fundamental error, his work is rich in valuable inquiries into details.

## § 14.

## (9.) BOULLENOIS.

Boullenois's work furnishes a continuous commentary upon Rodenburg's treatise, and gives in its adherence to the

principles there laid down, which Boullenois subordinates to the leading principle of the common good of nations (i. p. 49). It is remarkable that although Boullenois, like Rodenburg, in classifying statutes lays stress upon the words of the enactments, he does not leave their motive out of sight.

His accurate treatment of details, his comprehensive acquaintance with the various forms of French customs and usages, the delicate tests which he applies to the decisions of the French courts, which are copiously cited by him, and, besides all this, the independence with which he criticises the results obtained by Rodenburg, although, upon the whole, he adopts them, give Boullenois's work a permanent value : there is, however, often a discursive reasoning, losing itself in vague conclusions, that disturbs this favourable impression.

## § 15.

### (10.) ALEF.

Among the many dissertations devoted to our subject, or more or less concerned with it, that of Alef is worth remark. The author assails, first of all, the ordinary statute theory. He points out how divergent the opinions of authors are as to whether this or that statute is to be reckoned in this or that class. The distinction between statutes, in the ordinary sense, must be in the end sought for in the words of the enactment, and these must give way to the will of the legislator ; for it cannot be that a statute should, for example, be held to have a different meaning and a different effect, according as it should on the one hand refuse to its subjects the capacity of testing upon their property, or on the other provide that an estate should only be transmitted *ab intestato*. Accurately considered, an enactment can never be said to have regard merely to lifeless things, but must always be directed to the legal relations of persons in connection with these things.

If these attacks upon the ordinary statute theory are clearly laid down, the same cannot be said of Alef's own theory. Proceeding on the axiom that the power of the State, on the one side, must always be paramount within its own territory, and, on the other, must always be confined to it, Alef

deduces the application of the law of the country to the status and capacity of foreigners, and to the forms of legal contracts made in the country (Nos. 28-31), and demands that, in the case of contracts, the laws of the domiciles of the contracting parties, and the laws of the land in which the contract is made, should be recognised in reference to the question of capacity. The objection to this doctrine—viz., that by it the laws of the domiciles will have effect given to them outside their own territory, since it is possible that an act valid by the laws of a foreign country may be by them declared invalid—is attempted to be met by Alef with this observation, which is undoubtedly wrong, that the incapacity of a person for any transaction is something purely negative, and that therefore the validity of the law of the domicile need not be invoked to maintain it. It is plain that this theory is not only incomplete, for he has hardly anything to say of rights of property, but rests entirely on arbitrary assumptions, whose results stand in open contradiction to well-known necessities of commerce and actual fact.

The other writings of this period that touch upon our subject contain, upon the whole, mere repetitions of doctrines drawn from those already mentioned. Any views worth notice that may be found here and there, will be discussed hereafter when we come to treat of the various legal doctrines; we need only mention that, according to Hofæker's treatise (*De Efficacia*), the express will of the legislator, or that will as it may be discovered by construction of his laws, to which the judge who pronounces on any case is subject, is to rule, and, *in subsidium*, he proposes to appeal to the Roman law. But, since Hofæker does not give any more exact principles for such an interpretation of laws, and besides, as Wächter has pointed out (ii. p. 20), loses himself when he comes to details, his axiom, which is undoubtedly true, cannot be considered of any very great importance.

#### D. THE MOST RECENT TIMES.

##### § 16.

The statute theory, which, as we have seen, was generally held in the eighteenth century to be the true theory, cannot in

our day make any claim to validity. No doubt it is still to be found in the older text-books of Roman and German private law; but the authors who are specially concerned with international law long ago abandoned it, an example that has been followed by the more modern treatises. It is a recognised principle in all authorities that each individual State may, by virtue of its sovereign power, shut out foreign law from its own territory altogether.<sup>1</sup> On this question, however, two leading divisions of opinion exist: one party holds that the application of foreign laws may be traced to general principles; the other gives up the attempt to lay down any general principles, and only recognises the particular cases of such application.

### § 17.

Of the authors of the latter class, Fœlix attaches himself most closely to the statute theory. He starts with this principle: that, in consequence of the sovereign power that belongs to each State, the application of foreign laws may be entirely excluded; and where it is admitted, it rests upon a voluntary and friendly concession by the sovereign power, out of regard to the mutual advantages of such a course,—upon the *comitas nationum*, as earlier writers called it. Then, without an attempt to discover any general principle for this *comitas*, and rejecting all universal axioms, especially the older theory of *statuta realia*, *personalia*, and *mixta*, he confines the task of any author on the subject to this: that he shall classify the recognised cases in which foreign law is to be applied, in conformity with recorded decisions and the views of different authors; shall pronounce what the usage is; and shall extend that usage to analogous cases. He takes, however, the division of laws into *statuta personalia*, *realia*, and *mixta*, as a starting point, not because he considers that division exhaustive, but because it is practically useful, and,

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<sup>1</sup> The contradiction raised by Schäffner (p. 29) is only apparent. When he says that laws can only rule in cases which have, from first to last, been developed within their own territory, he means thereby that the laws of any territory cannot in reason shut out the application of foreign laws entirely. But with Struve the contradiction is seriously treated (pp. 22, 23).

taken up as it was by earlier authors, has been of real use in the historical development of the view that is recognised by himself (i. No. 20); abandoning any attempt to define *personalia* and *realia*—for the definition which he gives, viz., that personal statutes are those that follow the individual wherever he goes, while real statutes have no force beyond a particular territory, is a mere formal description to illustrate their operation—he includes among the *statuta personalia* or *realia* those laws which have been assigned to the one class or the other by the majority of earlier authors, although with the widest differences in detail; and among *statuta mixta* he includes not merely the laws which deal with the legal aspects of business dealings generally, but also those which relate to procedure and to crime, because these laws are to be considered as the consequences of men's dealings with each other.

If Fœlix's theory is to be adopted, he has no doubt carried it out consistently by stringing together the different cases that have been assigned to these three kinds of statutes, without any inner or real link among them, as well as by referring to the numerous passages, collected with extraordinary care, which he cites, and the unanimity of authorities and of judicial determinations therein demonstrated. But if this unanimity, which Fœlix so often assumes, is more closely examined, it often turns out that he has had no regard for the grounds of the opinion or judgment which he cites, but only for the result of that opinion or judgment upon the particular case; and besides that in such cases a more searching examination will frequently reveal contradictions, it is inevitable that the reader should feel convinced that the whole system of private international law consists of isolated and arbitrary postulates, and has no scientific foundation to rest upon at all. By the division of the subject he has adopted, we find, in the first place, that the laws which deal with procedure and with crime, in which the public law of a sovereign State may be exhibited, are treated under the inadequate conception of a consequence of men's dealings with each other, a conception which would include most things that are to be found in man's existence; and, in the second place, that it is much more difficult to

discover the true meaning of the author. Except in his treatment of the law of procedure, which is the most successful part of the treatise, there is no division of his work that corresponds with the ordinary systems of positive law; and the reader is consequently forced to inquire under which of Fœlix's artificial definitions any case must be reduced, before he can discover where he is to find a discussion of it.<sup>1</sup>

In spite, however, of this defect, the work is in many respects excellent. There is to be found a store of very valuable materials in the numerous references, decisions, and in the examples of legislative enactments that are adduced—and there are set out in this work most concisely and plainly the legal principles of almost all civilised States upon private and criminal international law—and a great service has been rendered by the interpretation which the author gives of the provisions of French statutes touching on international matters, a subject which very closely concerned him. The notes of Demangeat, in the fourth edition, furnish many very acute corrections and explanations, the editor adopting Fœlix's views upon the whole, but subjecting the details to an independent criticism.

Wheaton's treatment of the subject is similar. He, too, makes that *comitas* which is observed by the different States, as it appears in the decisions of courts of law and the theories of legal authors, the foundation for the application of foreign laws. Wheaton makes no use of the terms of the statute theory in the various isolated propositions which he lays down, and, indeed, there is no deduction of these propositions from general principles at all. Wheaton's view of the paramount application of the *Lex rei sitæ* is explained, as will afterwards appear, from the fact that he takes his stand on the ground of the common law of England and America. The whole discussion only occupies one part of Wheaton's book, consisting of not a fourth of the whole.

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<sup>1</sup> For example, a reader will hardly discover for himself that the doctrine of the necessity of a husband's concurrence in his wife's acts, the curatorial consent that is required of him, is treated of in a passage that takes up the question of the forms of contract.



## § 18.

Burge, too, declines to enunciate a general principle, and commits the decision of particular questions to the instinct of the lawyer (i. p. 11). No doubt he lays down a number of particular rules (p. 25), but these propositions—mainly borrowed from Boullenois, and, although quite unconnected and founded upon many different theories, still assumed to be capable of immediate application—contain nothing but specialities, and, as may be suspected from this description of them, are often self-contradictory. But yet this most comprehensive work, consisting for the most part of a comparison of the different systems of law that are recognised throughout the British Empire, is remarkable for the wonderful knowledge of the most various systems of law and of legislation displayed by the author, for the wealth of legal cases and decisions that are cited and criticised with acuteness and great independence, and for many excellent discussions of different questions.<sup>1</sup> In these discussions, Burge can use the considerations on which the laws of the different States rest most skilfully in reference to their international relation, although the treatment is not always consistent,<sup>2</sup> and instead of juridical principles, he has to invoke the assistance of considerations of expediency and general approbation.<sup>3</sup>

## § 19.

Story avoids any statement of a general principle,—a matter on which there is perpetual discord,—and, like Burge, proposes merely to illustrate, criticise, and establish more decidedly the law that is recognised (§ 16). He only avails himself of the expressions, *statutum personale, reale, and mixtum*, to describe the effects of particular statutes; and as he develops the principle of the paramount supremacy of

<sup>1</sup> See, for example, the discussion on the conflict of laws on the question of marriage.

<sup>2</sup> See, for example, i. p. 132, and i. p. 210, where different determinations are given upon the personal capacity for legal acts.

<sup>3</sup> See, too, the declaration of Mittermaier in Mittermaier and Zacharias *Zeitschrift für Rechtsw. und Gesetzgeb. des Auslandes*, Vol. II. p. 283; v. Mohl. *Staatsw.*, i. pp. 445-46.

every State in its own territory to its logical conclusions, he deduces the application of the laws of other countries from provisions to that effect in the laws of the country that allows them to be applied. Such provisions, which must often be put into practice by reason of the mutual profit of the various States, may be, he says, inferred although not expressed; and it is only when foreign laws are at variance with the interest of the home country that they are universally admitted to be inapplicable.

Story, then, as far as the leading features of his theory are concerned, is an adherent of Huber, but in details is highly independent. As may well be understood, he adheres very closely to the American and English *Common Law* in enunciating his own views, but he does not fail to take into view the grounds that foreign authors, especially the older authors, have assigned in support of this or that theory; at the same time, there is no attempt at an historical development of the subject. He gives in a masterly fashion very many reports of interesting cases decided in England and America, setting forth the facts and circumstances of each most clearly, and criticising with great subtlety the details of the grounds of judgment in each. This is most conspicuous in his treatment of the subject of "foreign contracts"—a subject that includes the greater part of the law of obligations, and seems, as a very important division of the whole, to be treated *con amore*.

Less successful, however, are his discussions on procedure; and when he comes to deal with the important questions of capacity of persons and their status, and also of marriage, the want of one leading principle makes itself very much felt, and in these questions the only resource for the author often comes to be, that he shall betake himself to mere utility, or to the very obvious proposition, that every nation may or may not permit foreign laws to be applied, as it thinks best.

His treatment of criminal international law is very scanty, only occupying ten pages out of eight hundred, and the difficulties of this subject he seems to avoid.

On the other hand, the practical division of the subject deserves recognition; it is not made according to artificial definitions, but according to legal categories, although

this division is not always strictly maintained, and one can often note a tendency to diverge to other departments of law, just as the definitions which he lays down are very often wanting in sharpness.

The student will lay down this book with an enlarged knowledge of decided cases, and of the opinions of different authors, and the judge will often be glad to test the case in hand by the help of Story's numerous illustrations and his wondrous power of comparison, and will find profit in doing so; but it will often be difficult for a reader to say from Story's discussion of a subject that the decision must, on legal principle, be what he pronounces it to be, and none other.

Rocco, too, treats the subject in the same way: he bases the application of foreign laws upon a tacit agreement of the different States, and inquires in what particular cases this agreement may by practice and the general approval of all be held to have been made.<sup>4</sup>

## § 20.

Massé, too, is without any general principle, and asserts that the justice and equity of each particular case must determine whether foreign laws are to be applied or not. There is this peculiarity in his theory, that he disputes the right, which the authors just mentioned concede to every State, of prohibiting the application of foreign laws in its own territory, without denying the force of express enactments to that effect (No. 48). In its details, Massé's method closely resembles that of Fœlix. He takes as his starting-point the well-known division of statutes in its ordinary acceptation; and although he declares himself opposed to the class of "*statuta mixta*," and to the rule, "*mobilia personam sequuntur*," his difficulty is purely verbal, and is not seriously argued out. It is, for instance, a *petitio principii* to say (No. 55): "*Il est manifeste, que la capacité civile d'un individu celle, qui derive de sa position, ne peut être déterminée que par les lois de la société, dont il fait partie.*"

<sup>4</sup> I have unfortunately been unable to procure a copy of this work, and have therefore had to refer to Mittermaier and Zacharia's *Zeitschrift für Rechtsw. und Gesetzgebung des Auslandes*, pp. 267-78 *et seq.*

His discussion of the law of obligations is disturbed by the terms he adopts from Foelix, which are artificial, and, as we shall hereafter see, in part untenable; as, for instance, the division of the results of a contract into foreseen and unforeseen, and of its form into external and internal, and so forth.

On isolated points, however, the work, which is of considerable detail, and is most closely associated with French jurisprudence, contains many valuable investigations, especially on the subject of procedure, which is discussed with interest and precision. The division that deals with the forms of process, a subject that is for the most part neglected by German authors, is remarkably good.

## § 21.

In Massé we find the voluntary concession of the lawgiver, the *comitas nationum*, falling into the background; but although no universal principle is enunciated, each individual case is to be determined by considerations of justice. In other authors, again, *comitas* is entirely thrown aside, and their theories are made to depend upon some comprehensive general principle.

Struvé's book,<sup>1</sup> in other respects of no importance, lays down the principle that every legal relation is to be determined by the laws of the place where it is to work itself out;<sup>2</sup> and this principle is carried so far as to deny validity in judgment to any positive enactments that infringe upon it.

Schäffner calls the doctrine of *comitas* a haphazard and unlawyerlike principle, which is for determining legal questions by political considerations. He proposes to determine every legal relation by the law of the place where that relation has come into existence. The legal status and capacity of a person are accordingly to be determined by the laws of his domicile; for the view of the law (which law?) could, according to him, never go so far as to assert that status and capacity could be brought into existence by a merely tem-

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<sup>1</sup> G. v. Struvé. Ueber das positive Rechtsgesetz in seiner Beziehung auf räumliche Verhältnisse oder über die Anwendung der Gesetze verschiedener Art. Carlsruhe, 1834.

<sup>2</sup> This principle is handled in the most extraordinary fashion.

porary stay in any country. Schäffner does not explain when a legal relation may be said to come into existence. Thus his first principle has no precision, and his deliverances on particular cases do not follow from his principle; while many of the illustrations which he gives may be turned right round.<sup>3</sup> For example, according to page 51, the question whether an illegitimate child can be legitimated by the subsequent marriage of its parents is to be determined by the laws of the birthplace of the child, because the birth of the child took place there, and thus the legal relation came into existence. But it may just as plausibly be said that the illegitimate child at the time of its birth stands in no degree of relationship to its father, and, therefore, the legal relation has not yet come into existence. Schäffner cannot help invoking the aid of the spirit and tendency of the laws, the nature of the thing, and other principles of that kind (p. 76, 65). In spite of the fact that the principle assumed by Schäffner is not adequate to settle the questions of international law, and is simply postulated and not proved in any way whatever,<sup>4</sup> it is not to be overlooked that this author sets out very concisely a number of instructive problems, and by his knowledge and observation of the principles of English law, which often diverge widely from those of the common law, is often led to valuable remarks.<sup>5</sup> The literature of the subject is very freely used, but not thoroughly enough; erroneous views of other authors are often successfully attacked. The last chapter (pp. 201-13) contains a short exposition of the law of process, in which the important subject of the execution of foreign judgments is discussed.

## § 22.

By other authorities the law of the domicile of the person is held to rule—viz., by Eichhorn (D. Privatrecht, § 27), Thibaut (Pand., § 38), and Göschen (Civilrecht, i. p. 111).<sup>1</sup>

<sup>3</sup> See Unger, Oesterr. Privatr., i. p. 160; Wächter, ii. p. 32.

<sup>4</sup> Wächter, ii. p. 32.

<sup>5</sup> See, for example, his remarks on the law of succession, p. 165.

<sup>1</sup> Also by Reyscher, Würtem. Privatrecht, § 82. And, before him, by Mittermaier, D. Privatrecht, i. § 27. In his sixth edition, Mittermaier has adopted Wächter's principle.

This conception seems at first sight to be a very natural one in reference to private law, with which these authors are alone concerned. "Every right seems at first to be a power that belongs to the individual, and so a property of the individual. Proceeding from this as our original point of view, we have to consider legal relations as attributes of the individual" (Savigny, § 345, Guthrie, p. 55). But, as has been pointedly remarked by Wächter (ii. p. 10), although the subject of one country may consider himself, when he is abroad, as bound by the laws of his domicile, it does not by any means follow that he must be judged according to these laws if he appears before the foreign judge. The principle is seen to be quite inadequate, if it is remembered that most of the questions of private law are concerned with the legal spheres of two persons, who may be subjects of different States, with different laws: the consequence would be the adoption of the system of personal laws, as in the Middle Ages.<sup>2</sup> In practice, Eichhorn cannot carry out his principle consistently. By a second axiom (§ 36), that, in so far as the rights of an individual have their origin without his domicile, or are to be exercised there, they stand in need of the protection of foreign laws, and that this can only be extended to them under certain conditions, his first axiom becomes indefinite, and cannot recover a definite meaning, as will shortly be shown, even although this additional rule be called into its aid—viz., that vested rights are to be recognised everywhere. The theory that, as a rule, the law of the domicile must prevail, takes a curious shape in Mailher de Chassat's book. He proposes that in the modern intercourse of nations, which rests upon intelligence, humanity, and the principle of nationality, the foreigner shall be held to be a representative of the nation to which he belongs (No. 11, 53). Private international law, which, after his view, is to be distinguished from the conflicts of the old statutes—according to him, the offspring of egotism and feudalism—is nothing but the law of one nationality in the dominions of another (No. 53, 337). The conflict resolves itself into a conflict of different governments. Mailher thinks that in this principle he has hit upon the

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<sup>2</sup> Wachter, ii. 12; Savigny, viii. § 345, Guthrie, p. 55.

solution of the question, and at the same time he calls to his aid, as his second principle, the independence of different nations. It is not clear how these two principles—the free development of a foreign nationality in a country that is not its own, and its limitation by the laws of that country, as Mailher also expresses himself (pp. 323-24)—are to be reconciled. As a consequence of the first principle, all questions of private international law must be determined by diplomacy, and in the last resort by war, which is a contradiction of the recognised principle of public international law—viz., that a foreign sovereign may not interpose to protect his subject against the sentence of a judge unless that judge has obviously failed in his duty (Vattel, ii. chap. vii. § 84). From the second principle anything that the court or parties please may be deduced. It is in vain to attempt to trace back to these principles Mailher's indistinct and confused deliverances, among which, however, one should not omit to notice some remarks that have good points in them.

### § 23.

Many people think that a great part of the difficulties that beset the subject may be got rid of by the rule that rights once vested are to be respected everywhere (Vattel, ii. chap. 8, § 110; Maurenbrecher, D. Privatr. i. § 144; Eichhorn *ut cit.*, Glück Comm. i. pp. 400), although but few authors take it as the foundation of their whole system (Titus, *Jus priv.*, i. c. 10, and the authorities cited by Wächter, ii. p. 2). From one point of view, however, the demand that vested rights are to be respected has reference to the legislation of one State only, as Wächter has already pointed out (ii. p. 3); from another, the whole principle of the doctrine runs in a circle, for in order to answer the question, whether a right is to be held as vested or not, it must first be determined by what law the mode of vesting is to be judged (Savigny, viii. § 361, Guthrie, p. 133).

The autonomy of parties, a doctrine which is also invoked, is of just as little importance. No doubt, parties within certain limits can give their legal transactions this or that meaning, and can therefore take the rules of this or that

system of law as the basis of their transactions. But, since the different systems of law agree in permitting this freedom of legal transaction to parties, it is not there that differences are to be found ; the problem rather begins when that so-called autonomy of parties comes to an end according to the positive enactments of this or that State, or where one has to deal with a statutory presumption of subjection to this or that law. Savigny has already noticed how inappropriate a title autonomy—by which is generally understood the right of certain associations or leagues to make laws for themselves within certain limits—is to describe this power that parties enjoy of giving their legal transactions, in particular cases, whatever meaning they please (§ 360, Guthrie, p. 136).

#### § 24.

Lastly, there are some who hold that the law, to which the judge who decides the question is subject, must rule. This view is most thoroughly developed by Pütter and Pfeiffer. The former applies this principle so unreservedly that he is led to consequences that place the security of all international intercourse in the most serious danger ; and he can only support his conclusions against generally received theories and the practice of courts of law, by the argument, that these have no clear conception of the international legal relations of different countries, and draw inferences from what is recognised, or has been recognised, in the case of different systems of law within one and the same territory, applying these inferences to the case of the laws of distinct sovereign States. Pütter, however, cannot conceal from himself that, by his theory, since it is very much a matter of chance in what country a law suit may come to depend, if the principle stated above is to be exclusively and consistently observed, the intercourse of different States would be impossible. The fact that the commerce of the world, notwithstanding this, goes on, is, in Pütter's view, proof that the principle stated above must be correct ; because, if the rule were otherwise, the merchant who bought for sale, would only have to sell the goods he had bought to a third party, in order to escape all claims against him for recovery ! (p. 74). As Pütter him-



self sometimes surrenders his principle entirely, and has to have recourse to the assumption that the subjects of any particular State do not trouble themselves much about the laws of foreign countries, or that the testimony of a foreign judge as to the validity of a transaction entered into under the laws of his country settles all the doubts of the judge who has to decide the question, it is not to be expected that a satisfactory solution of the question should be found in this author, although, on the other hand, one may find there many excellent observations on criminal law, especially in reference to the draft of the new criminal code of Prussia (pp. 93-96).<sup>1</sup>

Pfeiffer's work, as its title shows, does not go into detail. The principle already quoted is derived by him from the fact of the subjection of the judge to the law of his own country, and from the rule, for which he gives no justification, that the positive law of a State must be applied to all the cases that fall within it, without respect to persons or things. Pfeiffer maintains this position, on the ground that the knowledge of foreign law is as a rule defective, and proposes to exclude its application even in cases in which the intention of the parties is furthered by some special enactment to the same effect. The argument on the other side—viz., that the undeviating application of the law of the court that decides the case would allow the pursuer, as a rule, to alter at his own will the legal relations between him and the defender, by giving him the option of appealing at his own caprice to one court or another,—Pfeiffer thinks he can meet with the observation that the defender can exercise no small influence upon the jurisdiction that is to be applied, and upon the legal relations of the parties, by virtue of the power he has of choosing his domicile at his own caprice.<sup>2</sup> But if the pursuer in the one case, and the defender in the other, have the power of altering capriciously the legal relations that exist between them, that still leaves the element of caprice

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<sup>1</sup> At page 384, Pütter attempts to defend his theory in a special manner against Savigny's views. Against Savigny's doctrine of the friendly admission of foreign law, he takes up the position that every State jealously guards its own supremacy.

<sup>2</sup> P. 35.

to embarrass us in either case. It is plain that the author will find just as little support for his theory in the unattainable assimilation of the laws of all States.<sup>3</sup> The equality of citizens and foreigners before the law, on which Pfeiffer dwells, and which is the only principle that can be consistently carried out, along with the axiom already stated, becomes, if considered closely, in many cases a complete denial of legal rights to foreigners,<sup>4</sup> since we cannot expect our law to be in the minds of foreigners in their own country. In any case, the author should not have passed over as he has done the subject of jurisdiction, if he wished to show more minutely that his theory is capable of being carried out in practice. In its present shape Pfeiffer's theory negatives the possibility of international intercourse.<sup>5</sup>

Gand lays down the same principle in a more moderate way, when he derives from the admitted competency of the court to decide upon a particular legal relation, the propriety of applying the law to which that court may be subject. He infers from the fact that the prevailing practice of French courts as a rule excludes, in cases where there is a question of the application of foreign laws, the plea of nullity, if there be no violence done to any definite French statute, that it rests with the court to apply or to exclude foreign law, or that it is nothing but a consideration of convenience and practical advantage that opens the door for its admission. Gand, whose purpose is merely to treat of French statutes and practice in connection with the legal relations of foreigners, and who grapples with general propositions of international law, because these positive enactments are inadequate for his end, combines therewith various propositions taken from the older statute theory (Nos. 180-81, 204-20), and in doing so, greatly extends the category of real statutes. In spite of this defect, and although it is remarkable that the author does not abandon the conclusion he draws from the 14th Article of the Code Civile, which is unquestionably erroneous,—viz., that a pursuer, who is a Frenchman, in a question with a foreign defender, may unconditionally elect to have French or foreign law applied to his case,—the book contains many

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<sup>3</sup> P. 54.    <sup>4</sup> Savigny, § 348, Guthrie, p. 69.

<sup>5</sup> See also Mohl, p. 448.

details that deserve acknowledgment. Very many judgments of French courts are reported by him, and at great length.

This view is modified in a peculiar fashion by Kori.<sup>6</sup> He makes the import of the judgment dependent upon the possibility of summary execution, and proposes that the form of a contract executed by a foreigner in our country, and the legal capacity of foreigners within our territory, should be determined by our law ; but, as a rule, to this effect only, that the property of the foreigner which is within our country, but not any property beyond it, should be dealt with by the judgment which may be pronounced. It is easy to point out how impossible it is to carry out this theory in practice, and how plainly it conflicts with generally recognised principles of law. To carry it out, a new judgment would fall to be pronounced as often as a new article of property was brought by the foreigner into this country.<sup>7</sup> In particular cases, however, Kori, as Wächter has shown, uses quite different premisses, although he gives no demonstration of them.

### § 25.

Wächter, in his treatise which we have quoted so often, takes as his foundation, but in a very different way, the law to which the judge who decides the case is subject. In default of express instructions as to the legal relations that arise with other countries, he assumes that the spirit and meaning of the statute, and not its words, are to decide as to the application of foreign law ; and it is on this point that Wächter's treatise has undoubtedly advanced the study of international law. Wächter casts away without hesitation the conclusion that, because statutes can only bind the judge to administer the law of his own country, that is all they desire to effect. But as Wächter stops there, and applies in doubt the statutes of the judge who is sitting in judgment,<sup>1</sup> without

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<sup>6</sup> This work is short, and does not enter much into detail.

<sup>7</sup> See Wächter, Vol. I. p. 304 *et seq.*

<sup>1</sup> See, on the other hand, Savigny, § 361, Guthrie, p. 143. "To some extent we shall apply to our subject the practice of the civil courts, where every one on whom the burden of proof lies is cast if he does not succeed in adducing proof."

setting up any principle on the other side for finding out the spirit and meaning of the enactment in cases where it is called in question, his deliverances are in many points not quite free from caprice, although in individual instances they are excellent. Expediency is an end which Wächter reserves for the lawgiver alone, but does not allow it to serve as a principle for a judge's decision; a judge he would tie down to hard and fast legal propositions, which, as we shall afterwards show, must be point by point extracted from a general law of custom. We need not here bring under notice the well-known features that are illustrated by the works of this famous author. All we shall say is, that the German literature of the subject, up to the date of publication (1841-42), is most thoroughly employed, and subjected to a searching criticism. It is probable that a comparative truth might have been discovered in many theories, especially of more ancient date, differing from his own, which might have supplied it with an historical foundation. For instance, Wächter takes his stand solely upon the common Roman law. He therefore overlooks the influence of Germanic principles on the treatment of the question, and leaves unnoticed many theories which, from the point of view of Germanic legal conceptions, are certainly correct: this cannot but be felt if the subject be confined to the conflict of particular systems of law in Germany; and it is hardly possible to give full approval to Mohl's dictum, that it matters not whether the question is raised in relation to the laws of separate provinces, or of entirely distinct countries, considering that Wächter might certainly have reached some modification of his theory, and could have given it a more historical foundation, if he had had regard to foreign systems of law, which, like the English, have in many cases retained Germanic principles in a purer form.

Even Savigny recognises that a judge must be mainly referred to the laws of his own State; but he rejects altogether the extension of that proposition—viz., that in doubt they alone are to be applied. The legal intercourse among modern civilised States, except in the few instances where enactments of an exceptional kind, *e.g.* prohibitive laws, prevent the application of foreign law, is not based by Savigny upon

a jealous administration of its own authority by each State within its own limits; on the contrary, he demands, as *debitum justitiæ*, and not as a mere capricious concession, that in every legal relation we shall ask what is the territory to which that relation, by its own peculiar nature, belongs, and to which it is subject, or, as he expresses it in a more picturesque fashion, what is the territory where the legal relation has its seat.

There is nothing to be said against the justice of this theory, which, setting aside the distinction already taken, differs in form only from Wächter's principle. But, admitting the most various interpretations; it needed, in its application to particular legal relations, a broader development, which is often to be desiderated in Savigny. What, for example, would hinder us from assigning every legal relation to the State whose judge was to determine it, or generally to the territory in which it makes its appearance, and in certain circumstances, to a great number of different territories? Savigny, accordingly, can do no more than postulate the application of the laws of the domicile, in order to determine the legal status and capacity of persons.<sup>2</sup> He says again, for instance, in reference to the determination of questions of immoveable property by the *lex rei sitæ*: "Whoever wishes to acquire, hold, or exercise a right over a thing, betakes himself for this end to its site, and subjects himself voluntarily, for this single legal relation, to the local law that prevails in that territory." Now, upon this it is to be remarked, that in this sense all laws touching property rest upon voluntary subjection. Renounce the property in question, and you are no longer subject to the law. But it is nowhere demonstrated why these laws, which are valid in the place where the property is, should demand this voluntary, or more correctly, this necessary subjection in relation to questions connected with them. In short, the whole question is committed to the tact of the jurist; and it may certainly be admitted that by exercise of that faculty, Savigny often arrives at a correct decision. In spite of the employment of foreign literature, Savigny does not recognise that foreign

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<sup>2</sup> See, on the other hand, Walter, D. Privatr., § 43.

authors, who have foreign rules of law before their eyes, along with the common law of Rome, must attain different results from him who stands upon Roman common law alone. For example, he is certainly wrong in proposing to give up absolutely the contrast between the treatment of moveable and immoveable property in international law (§ 360, Guthrie, p. 137). The features which distinguish all Savigny's works, and are to be found in this part of the system of Roman law, need not be further discussed here.

Thöl conceives the whole subject to consist in the interpretation of the laws of the different countries. He asks which law desires to prevail, and which ought to do so, and thus reaches the position that it is impossible in this subject to lay down any universal rules, but that special considerations must determine all questions. The judge, according to Thöl, must follow the will of his own laws, without being constrained to apply these alone when in doubt. But Thöl does not explain on what principle that task of interpretation is to be taken in hand. The short rules set out by him<sup>3</sup> appear merely as postulates, which, however, frequently hit the truth. The acute remarks he makes upon particular cases will be again referred to below. In conformity with the plan of the work, the law of process is not taken up. There is, however, some consideration of the question how far foreign judgments can be put into execution.

Most of the works we have referred to are concerned with private law alone, many of them even excluding the law of procedure; and we have specially noted the cases in which criminal law is taken up. It still remains to allude to those that are specially concerned with criminal law. But since from the nature of international criminal law it has for its object merely the exposition of general principles, and not the inquiries into details with which private law is concerned, and since for this reason the books that deal with international law alone have a much narrower scope than those whose subject is private law in a narrower sense, it will be convenient, in order to save repetitions, to avoid any

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<sup>3</sup> This is in accordance with the object of the book, which is not intended as an exhaustive exposition and examination of the historical part of the subject.

separate criticism of these authorities, but to combine them with the examination of the various principles that may be advanced.<sup>4</sup>

## § 26.

### PRINCIPLES OF INTERNATIONAL LAW, PRIVATE AND CRIMINAL.

From the conception of territorial sovereignty, which is now so firmly established, there follows the right of the legislator to lay down for the courts of his country instructions for the disposal of each and every legal question that may form the subject of an action before them. The judge must follow the express directions of the legislature of his country in questions that have to do with international intercourse, just as much as in those that are concerned with questions of native law alone.

This is the principle, as we saw, that lies at the bottom of all the more modern writings on private international law, and Struvé alone rejects it. But there could hardly be a tribunal that would renounce its allegiance to the legislature, as he desires.

The difficulty, however, which all recognise consists simply in this—that it is quite exceptional to find express instructions of the legislature; and for want of these the judge must, by interpreting the statute law, seek out the will of the legislator, and decide in accordance with it.<sup>1</sup>

Those who advocate an undeviating application of native law to cases that stand in some relation to foreign countries, proceed from the further assumption, that, because the legislator has not devised some special rule, the judge can only abide by the general rule recognised for purely domestic legal

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<sup>4</sup> We shall still have occasion to cite the following books, which deal with private international law in general, and are therefore not concerned with isolated questions, or with the legislation of any particular country on international legal relations:—Reddie on Private International Law; Walker, Introduction to American Law; Bowyer, Commentaries on Universal Public Law; Ferrater, *Codigo del Derecho Internacional*.

<sup>1</sup> It is only in connection with criminal international law that we find plenty of express instructions given by legislators. That this phenomenon—viz., the want of express rules in private law, and their existence in criminal law, has a good ground, will be shown in the course of our inquiries.

questions. Those, on the other hand, who, when they find no express instructions from the legislature, make it the duty of the court, under certain circumstances, to have regard to foreign rules of law, assume that the legislator has had in view only the cases which come as a rule before the courts of his country—*i.e.*, cases to be decided on grounds of purely domestic law; and therefore, just as with any indefinite or incomplete statute, the will of the legislator must be determined for the special and exceptional case in question by a special process of reasoning; the determination of a question of foreign law is not to follow off-hand the rules that hold good for questions that are purely domestic.

Some authors (English and French authors of recent date) explain the application of particular foreign rules of law in individual cases by a reference to the necessity of friendly intercourse between States. But if it is friendly intercourse (*comitas nationum*) that opens the door for the application of rules of foreign law, this principle may be so variously interpreted, that it can never serve to prove whether foreign law is to be applied in any particular case, and if so, what law. At the same time, these authors appeal to practice; but, on the one hand, a satisfactory reference of this kind can only be made on a very few points, as soon appears from a study of these authors; and, on the other, when every definite principle fails, the practice that actually obtains in individual cases can afford no sure ground for determining other analogous cases.

Accordingly, a forcible juristic argument has been urged by others, founded upon the nature of particular propositions of law. If, as we have already seen, the theory of real and personal statutes, like the theory that proposes to determine all the legal relations of a person according to the laws of his domicile, lands itself in indubitable contradictions,—if, too, the theory of vested rights and other<sup>2</sup> theories rest upon a *petitio principii*,—it must be recognised as sound to commit the decision, with Wächter and Thöl, to the view of the legislator upon the question at issue, or, what is equivalent, to that law to which the problem in question is subject by its own nature, the view of Savigny.

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<sup>2</sup> For example, the theory advanced by Schäffner.



But it is not sufficient to say that in the particular case the application of a particular foreign law coincides with the view of the native legislator ; it needs, like every appeal to the spirit and meaning of a statute, some broader foundation.

To supply that foundation is the object of this treatise ; it will try, by an examination of details, which deserve to be called the best touchstones of general principles, to develop the principles enunciated in the works of Wächter, Thöl, and Savigny, to correct these, and to confirm them by an historical comparison of the views of different authors.

To this part of the subject, also, belongs specially the refutation of the objection raised most ingeniously in modern times, that, because the legislator, if he desires it, can prescribe the application of native law in all native courts, and must necessarily consider the law laid down by himself as the appropriate and proper means of determining the question at issue, therefore, unless the contrary is expressly provided, the legislator must contemplate that without exception all questions will be determined by native law.<sup>3</sup>

This objection is met by the axiom which all civilised nations recognise—viz., that the object of legal procedure is to declare existing rights, and not to create them. If the law that prevailed at the court that was to give judgment in each case were to decide upon the material import of the legal relations that may be in dispute, there can be no doubt, since very different tribunals may come to be competent in a particular case, that in many instances the judge would either have to create, or at least to modify, the legal relation in question. The issue cannot, in accordance with that generally accepted proposition, depend on the place where any legal relation may accidentally come to be the subject of a legal process, even if we leave out of view the very weighty practical results of a theory which makes the import of a legal relation depend on the *lex fori*—i.e., in the case where the courts of different States are equally competent, on the pleasure of the pursuer, and, at the same time, attributes an extra-territorial and even a retro-active force to native statutes, by demanding, as Heffter<sup>4</sup> remarks, that foreigners, in a foreign

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<sup>3</sup> Pfeiffer, pp. 40, 41.

<sup>4</sup> P. 71.

country, in bargaining about subjects situated there, should follow the law of the place.<sup>5</sup>

If, then, the application of foreign law seems, under certain circumstances, when express instructions are wanting, to be demanded, and the view of the legislator must be discovered indirectly by a process of reasoning, we cannot recognise as sound the objection that the view of the legislator cannot be objectively ascertained, but must rather be arrived at by subjective and arbitrary conjectures.<sup>6</sup> In reality, such a distinction between objective and subjective arguments does not exist; and therefore we need set up no general rules as to whether the view of the legislator can properly be reached by an objective demonstration; that must rather be left to depend upon the conviction of the reader or of the judge.

But if the principles that are postulated for the various branches of our subject are in harmony with each other, and if these principles can be logically pursued into details without contradicting the rules that are generally recognised in practice by all nations, and without doing violence to the natural instincts of justice and equity; and if, besides, it can be shown that the most eminent authors and the decisions of supreme courts agree in their results with what has been assumed to be the view of the legislator, although not invariably in the grounds on which these results are based, and which are so often inexactly or incompletely expressed, then the author believes that he will have pointed out an objective truth. He will certainly admit that he has not attained this end in all points; many a doubt will be left as to particular cases, but, upon the whole, he believes that an advance in that method which was laid down by Savigny, Thöl, and Wächter, is possible and necessary.<sup>7</sup>

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<sup>5</sup> The application of foreign law is not a *comitas* in the sense that a State which wishes to remain in intercourse with other States, would have a right to cast it off altogether: it is rather, as Lord Brougham remarks (Story, § 226, note, p. 333), a *debitum justitiæ*, which takes its origin from friendly intercourse—*comitas*.

<sup>6</sup> Pfeiffer, p. 38. The legislator, then, has no general view of international law; not even that native law alone must be applied.

<sup>7</sup> A judgment of a supreme court in Germany notes that the principle laid down by Savigny is certainly to be recognised as generally true, but that the consequences of it have not by any means been as yet established (Striethorst, xx. p. 307).

The following sketch of legal principles in their international aspects will serve to show clearly what the author understands to be the scope of statute law. But it must be noted that detailed inquiry will alone solve the question, what particular legal propositions belong to this or to that branch of the subject, and this sketch cannot be directly employed to determine particular legal problems. This remark suggests a further observation, that in strictness there should be a special inquiry into the international relations of each separate rule of law: such a task, however, would never be brought to an end, so infinite is the list of rules of law, and so constant are the changes in the law itself. Most rules of law, however, are merely logical deductions from general principles, for even new positive enactments are logically and historically bound up with others; and thus we can by a natural process pass from the international aspects of one rule of law to those of another which is akin to it. But though such a process is permissible, it is as little possible to lay down general rules for it, as it is to say generally how the language of statutes is to be read. Interpretation, as Savigny remarks, is an art to be applied to each case by itself. The undertaking must therefore be considered to have been exhausted if, in the course of the inquiry, we shall discuss those prominent questions of detail which have been found of special importance in international intercourse, and with which the authors on the subject, as well as the long list of judgments that are before us are principally concerned.

Finally, it should not be left unnoticed that in some points a special law of custom has modified the logical deduction from the nature of the subject, and of course all reference to this law of custom, just because it concerns merely isolated points, belongs to the special inquiry into the various branches of the subject.

The laws which concern the capacity of certain persons to contract,<sup>7</sup> have for their object merely to provide a permanent

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<sup>7</sup> From this must be distinguished the laws that concern capacity for legal rights; the generally recognised rule decides upon the latter—viz., that foreigners and natives, in relations of private law, have the same capacity for legal rights. See § 42 *et seq.*

protection for these persons. This object can only be attained if the subjects of our State remain under the sway of our laws, although they may be temporarily resident in a foreign State, and remain so in respect of all their property, even although it may lie in a foreign country. On the other hand, this object cannot be attained in the case of strangers who have only a temporary residence in our State, or happen to have property there. Subjects of our State, therefore, will be treated before our courts as of no contracting capacity, even although they may have entered into contracts abroad ; and, conversely, strangers will never be treated as incapable of contracting by our courts, because according to our laws, they would not possess such capacity.<sup>8</sup>

The object of laws relating to things can only be attained if either the law of things that prevails in the domicile of the parties interested, or that which prevails at the place where the transaction takes place, are left out of account ; but at the same time, the design of the legislator can only reasonably have reference to property that is situated within his territory, and so the *Lex rei sitæ* alone rules.<sup>9</sup>

Relations of obligation have their essence in the concurring wills of the parties to them. And hence it is of the highest importance to inquire to what territorial laws the parties wished to subject themselves ; or, if this is not clear, what conditions they must equitably be held to have had in view. But where, in the law of obligations, we find exceptional enactments to control the will of the parties, we must again set ourselves to inquire whether the aim of the legislature is only to be attained by applying the statute to all contracts entered into or implemented in our territory, or whether it rather intended to give the subjects of our territory a special protection ; or whether, lastly, the judicial ratification of the contract was meant to be confined to the courts of our country : in the first case, the law of the place where the contract was entered into or is to be implemented rules ; in the second, the law of the domicile of the

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<sup>8</sup> These logical conclusions are modified by a general consuetudinary law for the States of Europe, as we shall afterwards have to remark.

<sup>9</sup> For a detailed demonstration, see *infra*, §§ 57, 58.

person ; in the third, the law of the country where the court is situated.

The aim which the law of the family has before it can only be attained if the subjects of our State, even when temporarily absent abroad, remain under its authority ; and conversely, it would never be attained if it were to be applied to persons that have no permanent allegiance to our State, and are only temporarily resident in it. The law of the domicile therefore claims authority in such questions.

According to the axioms of Roman law, the heir represents the person of his predecessor in all legal questions relating to his property. This entire personality, with all the relations attaching to the property, can, as a legal conception, exist only at the centre of its legal activity, and therefore only at the domicile of the person. The transmission, therefore, of the legal person of the predecessor to the heir takes place according to the law of succession prevailing at the domicile of the predecessor. Conversely, by the conception of English law, the law of succession, so far as immoveables are concerned, is merely a special variety of the law of acquiring things ; and therefore by English law the *lex rei sitæ* rules.

The law of process prescribes the conditions and the forms under which the sovereign power of the State sets itself in motion to deduce and to vindicate private rights. And from this the converse follows, that the State will not set itself in motion under any other conditions or forms, and therefore, in questions of process, the law of the place where the tribunal is, is to be applied.

The aim of the criminal law can only be attained if all persons within the territory of the State, even although they are merely passing through it, are subject to it ; while, at the same time, the permanent subjects of any State are subject to her criminal law while abroad, unconditionally as regards their special duty to her, and as regards other acts also, unless they give satisfaction to the sovereign authority of the foreign State in whose territory the criminal act was done, and whose criminal jurisdiction is competent ; or unless the act was lawful in the place where it was done.

Laws as to procedure in criminal matters are, like the laws of

civil procedure, merely regulations as to the forms and conditions under which the sovereign authority will set itself in motion to investigate and punish crimes. Whether a criminal process has been shown to be required, is bound up with the question whether it ought to take place on the requisition of another country, and whether, therefore, any legal assistance should be given by the one to the other.

## Second Part.

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### GENERAL PRINCIPLES OF PRIVATE AND CRIMINAL LAW.

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#### I. EQUALITY OF LEGAL CAPACITY IN FOREIGNERS AND CITIZENS.

#### § 27.

MODERN international law lays it down as an axiom, that where special exceptions are not expressly made, the foreigner in all legal questions, whether of private or criminal law, is not subordinated to the citizen, but enjoys just the same legal capacity.<sup>1</sup>

Even the Italian jurists of the middle ages, Baldus, Barthol. de Saliceto, and others,<sup>2</sup> express themselves to this effect, and it seems unnecessary to heap up a pile of citations, which could be easily accumulated from modern authors, decisions, and statutes upon this axiom.<sup>3</sup> It is only with reference to the

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<sup>1</sup> The axiom must, however, be confined to the capacity to acquire all rights. A perfectly similar treatment by the law is not meant. The latter would devolve an undeviating application of the law prevailing at the seat of the tribunal that was to decide the question.

<sup>2</sup> Cf. *e.g.* Baldus, in L. *Si non speciali*, 9, num. 2, C. *de testamentis*; Barthol. de Saliceto, in L. *cunctos*, C. *de S. Trin.*, num. 8.

<sup>3</sup> Cf. *e.g.* Mevius, in Jus. Lub. Proleg., qu. 4, § 37; Walter. D. Privatrecht, § 60; Mittermaier, D. Privatr. 6th ed. § 109; Hofæker, *de eff.*, § 23; Oppenheim, Völkerrecht, p. 357; Bülow and Hagemann, Prakt. Erörterungen, ix. pp. 142-43; Spangenberg in Linde's Zeitschr. für Civilrecht und Process, iii. p. 431; Feuerbach, Themis, p. 325; Maurenbrecher, D. Privatr., 2nd ed. § 141; Decision at Berlin of 21st Sept. 1849 (Deci-

acquisition of landed property that it is usual to put a restraint upon the capacity of foreigners ; but they are often subjected to what is called foreigners' attachment (*Ausländer-arreste*), and are bound over to find security for the expenses of process. These two latter regulations are not in truth any inequality in legal capacity, but are rather a power given to the opposite party in the process by which he can protect himself against the risk necessarily arising from the fact that a foreigner can more easily withdraw himself from the jurisdiction of the court, and so prevent his antagonist from following out the judgment that may be given.<sup>4</sup>

A different theory is maintained by the majority of French authors. They divide all rights into *droits civils* and *naturels* ; it is only the latter class that they would allow foreigners in France to enjoy—the former are to be the exclusive privilege of the French, and, under certain conditions, of foreigners formally domiciled in France.<sup>5</sup> It is, however, impossible to maintain such a distinction between natural rights and private rights which exist only by virtue of the positive laws of a particular State. Certain legal propositions, and among them those that have their concern with the ordinary affairs of commerce, are no doubt alike among all civilised peoples ; but in spite of that, we have already seen that the idea of a law that is radically independent of the existence of separate States, is false, as may easily be shown by examples. For instance, nothing seems more natural to the general legal mind and conscience than that contracts, in whatever form they may be concluded, should be kept intact. But positive law prescribes a particular form for many contracts, and this must, if anything at all can be treated as a rule differing from natural law, be treated unquestionably as a rule of the *droit civil*. These forms of

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sions, xviii. p. 148), Pr. A. L. R., § 41-44 ; Pr. Allgem. Gerichtsordnung, i. 50, § 162 ; Sup. Ct. Berlin, 16th July, 1857 ; Striethorst, xxvi. p. 139 ; Austrian Civil Statute Book, § 33 ; Wächter, i. p. 252-53 ; Bopp. in Weiske's Law Lexicon, iv. p. 359-60 ; Hannov. C. G. B., art. 3 ; Köstlin, Sys. des Strafr. § 23 ; Burge, i. p. 694 ; Blackstone, i. 338 ; Stephen, i. 438 ; Bluntschli Allgem. Staatsr. 2nd ed. i. 468.

<sup>4</sup> Unger, Oesterr. Privatr., i. p. 303. [On the right of foreigners to sue, and the practice of requiring them to find caution, see *infra*, §§ 117, 118.]

<sup>5</sup> Massé, ii. pp. 22-26.



contracts can consequently have no application to the intercourse of foreigners. But a French author or a French court of law will hardly be found to lay down that in a case where writing is required by French law to complete a contract, this rule is not to be applied to contracts concluded by foreigners with Frenchmen in France. Roman law, no doubt, as we have seen, recognised such a *jus gentium* common to foreigners and Romans, and this idea was justified if the foreigner was only to be recognised as having legal capacity in reference to certain definite branches of law. But if we assume, as the legal mind of the present day does, that foreigners in matters of private law are not to be placed at a disadvantage with citizens, a distinction of the kind loses all definite meaning, and results at last in an arbitrary oppression of foreigners. As a matter of fact, even in French jurisprudence the greatest conflict prevails over the division of the different rules of the law into these two classes,<sup>6</sup> and Gand, after seeking in vain for a solid definition of *droits civils*,<sup>7</sup> ends in the correct deliverance that by French law foreigners enjoy certain *droits civils* as well as *naturels*, that is, all rights which the legislature has not expressly denied them.<sup>8</sup>

The French statute book does more to place foreigners at a disadvantage with citizens than any other statute book (cf. e.g., Code Civ., art. 14 ; Code de Commerce, art. 575) ; and by the 13th article it specially allows the enjoyment of *droits civils* only to foreigners who have acquired a domicile in France under the authority of the emperor, from which it must be inferred that foreigners are not allowed these rights generally. But no general rule is laid down as to what are *droits civils*, and it is only in one case that a particular right is denied to foreigners as a *droit civil*. Mailher de Chassat casts off, and with justice, the whole distinction, and holds only political rights to be truly the exclusive privilege of the French ; he demands no further

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<sup>6</sup> See Rosshirt in his *Zeitschrift für Civil- und Criminalr.*, iii. p. 335 ; and especially Savigny, *Syst.* ii. p. 154.

<sup>7</sup> Gand, No. 135.

<sup>8</sup> The Cour de Cassation expresses itself in a similar way ; Judgment of August 5, 1823 ; Sirey, xxiii. 1, 253.

guarantee from foreigners than is required by the fact that they can more easily withdraw themselves from French jurisdiction. Demangeat, too (Notes to Fœlix, i. p. 98), tables this sound proposition, which Gand himself at last admits:—*“Pour nous l'étranger a la puissance de tous les droits civils qui appartiennent au Français à l'exception de ceux, qui lui sont positivement déniés.”*<sup>9</sup>

Vattel (ii. § 88) considers the capacity to acquire things that have no owner as an exclusive privilege of the native citizen. According to his conception, such things are a common property of the natives that has been left in the original common stock unappropriated, and therefore no foreigner has any part in it. He will not, therefore, allow a foreigner the rights of the chase in countries where these are free; and maintains that a foreigner who finds a treasure does not acquire any property in it, although a citizen in the same circumstances would do so. But the conception of a thing that has no owner excludes any special right in any one, and excludes, therefore, the common rights of all citizens. Accordingly, unless foreigners are expressly excluded from acquiring anything at all by occupation, the acquisition of things that have no owners must also be granted to them. But if, as is generally the case with sporting rights, there is in any particular privileged person—be this the body of citizens or not—an exclusive right of occupation, the foreigner cannot make any use of the right which he undoubtedly has, of acquiring property in a thing that has no owner, by

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<sup>9</sup> It is only political rights that can justly be withheld from foreigners. Every other distinction is capricious, and is also impracticable, unless it is intended to confine the intercourse and legal capacity of foreigners to the narrowest point. That a foreigner should not be capable of being adopted by the subject of our State (Decision of the Cour de Cassation, Paris, 5th August, 1823; Sirey, xxiii. i. p. 353) appears at first sight consistent, but is without any meaning if foreigners are allowed to found great trading establishments, and to exercise in this way a considerable influence over a large number of persons. According to the opinion of the majority of French jurists (Massé, p. 32), foreigners cannot be instrumentary witnesses in France. But surely it is unsound, according to legal notions of the present day, to treat the capacity of bearing witness as a political privilege. [As to the incompetency of a suit between foreigners in the French courts, and the exceptions to the rule which the exigencies of trade have introduced, see *infra*, § 118, note.]

occupation, a circumstance which may explain Vattel's notion. So long, however, as foreigners are not excluded either by statute or by custom, the right of occupation may be as competently exercised by foreigners as by citizens.<sup>10</sup>

An exception from the rule of law as to the equality of foreigners and citizens in matters of private law, and the similarity of treatment to be accorded to them, an exception that is recognised by international law, is the doctrine of Retaliation (Retorsion), *i.e.*, the application of prejudicial rules of law to foreigners, where the State to which they belong applies the same or similar unfavourable rules of law to our citizens. A necessary condition of this rule, however, is that the foreign State should set the citizens of our State, or all foreigners, at a disadvantage in the matter in question, for the reason that they are subjects of our State or foreigners generally. If it is merely the difference between the foreign law and our own that is accidentally the cause of the prejudice done to the citizen of our country, and if a subject of the foreign State would in similar circumstances be similarly dealt with, then there is no ground for retaliation. Retaliation is only permitted for the purpose of resenting injustice to our own subjects, and preventing it for the future; but not at all, as would be the case if the rule were extended as above indicated, for the purpose of forcing a foreign State to apply our laws in its own territory.<sup>11</sup> In the definition that is given of retaliation as the establishment of a rule of law to the prejudice of foreigners, there is included this consideration, that the

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<sup>10</sup> Püttlingen, § 66. [By the common law of England and Scotland, aliens were under various disabilities, *e.g.*, were incapable of purchasing or taking by succession heritable property; but by 33 Vict. c. 14, this and various other disabilities are removed: aliens are still incapable of exercising political rights—the statute is declared not to qualify an alien for any office, or for any municipal, parliamentary, or other franchise: nor can an alien be owner or part owner of a British ship, or in Scotland be appointed tutor or curator. The disability of foreigners not naturalised to take real estate, although now abolished in many, still subsists in some of the States of the Union. The Court of Appeal of New York (*Lubrs v. Times*, 24th February, 1880), held that the real estate of an American citizen, *i.e.*, a naturalised citizen, who had died intestate, did not fall to his father, who would have succeeded in the ordinary course, in respect that the father was an alien: a sister, who had been naturalised by marriage, was preferred.]

<sup>11</sup> Heffter, *Völkerr.* pp. 199, 200; Unger, *Oesterr. Privatr.*, i. p. 304.

rule of law thus laid down has no application to rights already acquired;<sup>12</sup> and, moreover, a resolution of the sovereign power as legislator is needed before retaliation can be put in force: the judge or any private person is not entitled to put it in force.

But because it is the general rule of civilised nations in their intercourse, that foreigners and natives should be treated alike, a foreigner who makes claim to any right in our State cannot be called upon to show that our subjects are similarly treated in his State; but rather where retaliation is permissible upon the principles laid down, and has previously received sanction, the opposite party must show that foreigners do not receive the same treatment as subjects in the State to which his opponent belongs. That, too, must be the case, if the law makes certain legal privileges dependent upon the fact that in the foreign country our fellow-citizens are placed at no disadvantage with the subjects of that country in the circumstances supposed.<sup>13</sup>

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<sup>12</sup> Klüber, *Europ. Völkerr.* § 234, note. Retaliation is a reciprocal withdrawal of imperfect rights.

<sup>13</sup> [The principle of retaliation is illustrated by the attitude of the Italian court to French defenders cited before them by Italian subjects. The French courts, proceeding upon the 14th section of the Code Civil, will entertain suits brought by a French subject against a foreigner who is neither resident nor domiciled within French jurisdiction, thus violating in favour of their own subjects the ordinary rule of law, *actor sequitur forum rei*. The Italian courts observe this rule, and where the defender is a foreigner, decline to exercise jurisdiction over him, except in cases where other well-recognised principles of international law allow it; but in respect of the unwarrantable and prejudicial powers arrogated to themselves by French courts, the Italian courts will not refuse to exercise their jurisdiction against French defenders, when it is invoked by one of their own subjects. This they justify by the maxim, "*Quod quisque juris in alterum statuerit, et ipse eodem jure citatur.*" Judgment of the Court of Cassation at Turin, in the case of *Debenedetti v. Morand*, 22nd August, 1878. It has, however, been remarked judicially, in another case where the court exercised a similar jurisdiction, that such a proceeding is not founded on any rational principle, and, as it must lead to jealousy and hostility, will be confined within limits as narrow as possible.

The Austrian Code of 1811, provides by its 33rd section that foreigners, as a general rule, shall enjoy the same civil rights, and be liable to obligations in the same way as natives; but the foreigner must, in cases of doubt, lead evidence to show that the country to which he belongs treats Austrian citizens in the same way.

The following introductory questions must be settled before we proceed to the different branches of the subject :—

1. Is there any difference between the application of different particular laws within one and the same State, and the application of the laws of a foreign State ?

2. What is the relation of private persons to any State which determines their permanent subjection to its private and criminal law ?

3. Is it *pars judicis* to apply foreign law, or can it only be done on the motion of one of the parties, and how is foreign law to be proved ?

## II. THE APPLICATION OF DIFFERENT PARTICULAR LAWS WITHIN THE SAME STATE, AND THE APPLICATION OF THE LAWS OF A FOREIGN STATE.

### § 28.

The first of the questions suggested at the close of the last paragraph,<sup>1</sup> is answered by the older authors, almost without exception, in the negative ; sometimes by implication, as by taking the illustrations which they select now from the different particular laws of one and the same State, and again from the laws of separate States, and deciding both on like principles ;<sup>2</sup>

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By the German Code of Procedure for the Empire, which came into operation on 1st October, 1879 (*Deutsches Gerichtsverfassungsgesetz*), it is provided, §§ 660, 661, that a foreign judgment shall not be admitted by German courts to be put into execution in Germany, unless the courts of the foreign country are in the practice of giving effect in like manner to the judgments of German courts. By the bankrupt law of the German Empire of 1876, it is provided, § 4, that the Chancellor of the Empire, with consent of the Federal Council, may order measures of retaliation in bankruptcy procedure against foreign citizens, and those who claim in their right. The Prussian Code of 1794 provides in a similar way that the enjoyment of equal rights with natives shall be accorded to foreigners, unless the foreign State by oppressive legislation has placed Prussian citizens at a disadvantage.]

<sup>1</sup> Many pass over the whole question, as for example, Schöffner, Fœlix, and Story. It may be inferred that these authors hold that there is no distinction in the treatment of the two cases.

<sup>2</sup> Bartolus in *L. 1 C. de S. Trin.*; Albertus Brunus, *de Stat.*, art. 6, §§ 3, 5; Argentæus, art. 218.

sometimes expressly;<sup>3</sup> and in modern times a considerable majority express themselves to this effect.<sup>4</sup> Feuerbach (Themis, p. 283), Puchta (Pandects, § 113), Pütter (p. 20, Archiv. f. d. Civilpraxis, Vol. XXXVII.), Mailher de Chassat (Nos. 201, 227, p. 308), will have the application of particular laws in the same State, and the laws of different States treated in quite different fashion, and even Wächter seems to incline to this view (i. p. 274, note 80).

Neither side's adherents, however, assign reasons for their divergent views; as a rule, the adherents of the second school do not say wherein the difference lies. Puchta only expresses himself distinctly, whereas in Feuerbach's deliverances it is vain to seek for a precise meaning.

Different particular laws may arise within the same State in three ways:—

1st. By the union of an independent territory, or of a territory that belonged to a different State, with the sovereign State.

2nd. By a grant of autonomy made by the sovereign power to a particular district, for certain purposes.

3rd. By the enactment of a law to apply exclusively to a particular district.

In the first case, the reciprocal application of the law that is recognised in either division of the State, can only undergo a change at the incorporation of these divisions, if the law which prevails in the one province thereby acquires a different meaning for those legal relations in which it is proposed to apply the law of the other; for, as we have seen, the doctrine of the conflict of laws is nothing but an interpretation of the law of different territories. But, according to well-recognised principles, the laws of each State are

<sup>3</sup> Burgundus, i. § 45, "*Nec facienda vis est quod Principis auctoritas easdem leges firmaverit*;" Huber, l. c. § 11; J. Voet, *de Stat.*, § 1; Titius, i. c. 10, § 59; Mevius, *Decis.*, ii. 185; Boullenois, i. p. 521.

<sup>4</sup> Zachariä in Elvers Themis, ii. p. 96; Hauss, p. 11; Merlin, *Rép. Vo. autorisation maritale*, sect. 10; Reyscher, *Württemberg Privatr.* i. § 81; Philipps, *D. Privatr.*, i. § 23; Beseler, i. § 37 (he certainly expresses himself in this sense only so far as private law is concerned; in criminal law, for example, he will have other principles applied); Gerber, *D. Privatr.* § 32, note 3; and especially Savigny, § 347, Guthrie, p. 64.

applied in the same sense after the incorporation as before, except in so far as there is an express alteration of them introduced, which, for reasons of public policy, is always to a certain extent the case when one State is incorporated with another.<sup>5</sup> In the first case, therefore, the theory which demands a different treatment for the laws of different provinces must be cast aside, as standing in contradiction to the last quoted rule of law. In the second case, the special district in question will be recognised by the central State authority as independent for the purposes of the enactment in question. From this independence, it follows that for this purpose a province will be regarded as an independent foreign State, and a similar answer may therefore be given to the question in this case, as it may also for the third.

There seems to be room for an exception in the first case, if the application of a particular rule of law is dependent on whether a particular person is a foreigner or a native subject. All inhabitants of the newly acquired province count as subjects, and therefore a rule of law different from that which formerly prevailed comes, in the case in question, to be applied to them. This is, however, no alteration of the rule of law, but only an alteration in the circumstances of the individual.

The practice in England affords numerous examples of the same treatment being applied to the laws of a foreign country, and to the laws of an independent province or colony. For example, judgments that have been pronounced in Scotland are not applied in England until they have been proved ;<sup>6</sup> and in a well-known case, a spouse who had obtained a

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<sup>5</sup> In the kingdom of Hanover, in modern times, the question of the applicability of statutes dealing with the private law of a city to a parish newly added to the city, has been much discussed and answered by Francke and Laporte (*Magazine for the Law of Hanover*, 1853, p. 370 ; *New Magazine for the Law of Hanover*, 1861, p. 203), as indicated in the text. Cf. also Leonhardt, *On the Doctrine of Legal Relations to Real Property*, Hanover, 1843, p. 45. A singular exception exists by virtue of a special royal warrant of 7th October, 1856, as to the statutory rule of succession between spouses in the city of Hanover.

<sup>6</sup> Burge, iii. p. 1057. [But by the Judgments Extension Act, 31 & 32 Vict. c. 54, a judgment obtained in England may be registered in Scotland, so as to have the same effect there as in England, and *vice versa*.]

divorce in the Scottish Courts, and had married in England again, was convicted of bigamy, because the English courts did not recognise the decree of divorce.<sup>7</sup>

The opposing arguments adduced by Pütter and Mailher de Chassat are quite confused ; while neither of them explains wherein the distinction between different territorial and provincial laws, in so far as their conflict is concerned, lies.

According to Feuerbach, a provincial code is not given to the district, speaking geographically, but to its inhabitants ; and the geographical boundaries are only named for the purpose of defining the section of the subjects of the State for whom these laws are to have binding force. According to this view, a regulation of police restricted to a province would only affect the inhabitants thereof, and the inhabitants of other provinces could injure them unpunished : the system of personal laws would be established for different provinces.

Puchta is of opinion that when the laws of different provinces come into conflict, that law should alone be put in force which is required by the nature of the circumstances ; but, on the other hand, when the laws of different States come into conflict, the foreign law should only be applied in exceptional circumstances, because the judge is only called upon to apply the law of his own people and his own State. But the judge does not apply foreign law because it is laid down by a foreign Government, but because the law of his own country desires to have the question determined according to foreign law ; and the judge of any particular province has, in the same way, only to apply the law that is recognised in his

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<sup>7</sup> Burge, i. p. 672. There are decisions of the Parisian Court of Cassation to the same effect, of 18th Thermidor, anno 12 (Sirey, xii. 1, p. 73) ; and 12th August, 1812 (Sirey, xiii. 1, p. 226)—the first, that the union of two countries into one State does not make the judgments previously pronounced in the one country applicable in the other ; the second, that the union of two countries under one prince does not affect the question, although both judgments were pronounced in the name of the same prince. Decision of the Sup. Ct. of Berlin, 5th August, 1841, Decis. ix. p. 381. By the 4th section of the introduction to the Prussian A. L. R., the subject of a foreign State, if he lives in Prussia, is to be tried by the laws of the country ; and therefore, if two different codes are recognised in the country, his liability for damages must be regulated by that code under which the act for which damages are claimed may happen to fall.



district,<sup>8</sup> precisely as the judge of a foreign State, in which there are no particular provisional laws, must extract the rules for his decisions from the laws of his own State. According to Puchta's view, in the second case some other principle than the nature of the circumstances must guide the decision, which must therefore be contradictory or unjust.<sup>9</sup> It cannot, of course, be denied that a central authority can lay down fixed rules for the application of the various provincial systems of law, and that the same result may be brought about by custom, and frequently, too, by a combination of the two. For instance, in the absence of special treaties, the sentences of foreign criminal courts will not be carried out in the territory of another State; but criminal sentences which depend on provincial laws will, as a rule, be carried out all over the territory of the State to which they belong, either by reason of special enactments of the legislature, or of an universal usage.<sup>10</sup> By the union of two countries under the same prince, or, in a greater degree, by their union into one State, the course of legislation in the two territories will probably be assimilated, and in the course of time cases of conflict will become rarer; but when cases of the kind do occur, without any special rules of the kind we have described being laid down for their solution, the same principles must determine them as regulate cases of conflict between the laws of different States. If, for example, a country in which slavery exists is united with one where it does not, it will be just as

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<sup>8</sup> The supreme court of the country decides just in the same way as the court of first instance was bound to decide. In this way, the reason assigned by Puchta (Lectures, § 113) for not admitting, in these circumstances, the application of the rule that every judge must apply the law that prevails in his jurisdiction—viz., that the division of the territory of a State into different judicial districts, under one supreme court, is only an administrative regulation, and can have no influence on the conflict of law—is to be met. It is not, however, always the case that the different provinces of one State have one supreme court.

<sup>9</sup> To the contrary effect, see *Burgundus, l.c.*: *Nam et Hannonum statuta principali auctoritate in contrarium sancita sunt; at in ambiguo, nonne ea potius accipienda est interpretatio, quæ vitio caret.*

<sup>10</sup> Hann, *Strafprocessorder*, § 231: "All sentences of criminal courts in the country are to be carried out all over the country." For a full discussion of the subject of foreign sentences, see below, § 146.

impossible to follow an escaped slave into the territory of the latter as it was before the union of the countries.

### III. DOMICILE AND NATIONALITY.

#### A. *Domicilium* AND *Origo* BY ROMAN LAW. IMPORT OF THE ROMAN DOCTRINE OF DOMICILE FOR THE DETERMINATION OF PERSONAL RIGHTS IN MODERN JURISPRUDENCE.

#### § 29.

We have seen that many rules of law have as their subject the permanent relations of particular individuals. We have now to inquire what is the ground of the obligation that subjects a person to the laws of a State, with the effect of prescribing for him a permanent set of relations.

The domicile of a person is generally assumed as the ground for subjecting a person to those laws.<sup>1</sup> But it may well be thought that it is on the right of citizenship in a State, and not on the fact of residence, that the application of the laws in question depends; and, as a matter of fact, there is no lack of writers and of enactments that start from this point of view.<sup>2</sup>

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<sup>1</sup> So Albertus Brunus, *de stat.*, art. 8, § 136; Alderan Mascardus, *Concl.* vii. No. 71; Burgundus, ii. §§ 1-5; Mevius, *ad Jus. Lub.*, ii. cit. 2, art. 10, No. 3; Wening-Ingenheim *Civilr.*, i. § 22; Unger, *Austrian Private Law*, i. p. 113; Thöl, § 78; Gerber, § 32; Demangeat, in his *Notes to Fœlix*, i. p. 59; Savigny, § 359, *Guthrie*, pp. 125, 126. Wheaton, i. p. 109, reports a judgment of an English court pronounced to this effect. Story, § 40, takes as a fundamental principle the place where a person lives or has his home, without inquiring whether and to what extent another relation may be taken into account.

<sup>2</sup> So Massé, ii. p. 81; Beseler, *Ger. Private Law*, i. § 39; *Austrian Statute Book*, § 4: "Municipal laws bind all citizens of the countries for which they are proclaimed. Citizens continue to be bound by these laws, even in the transactions and affairs which they carry on outside the territory of the State." But it is the place of residence which is assumed to regulate the relations of foreigners, § 34. "The personal capacity of foreigners for entering into contracts is in general to be determined by the laws of the place to which the foreigner, by reason of his residence, or, if he has no particular residence, by reason of his birth, belongs as a subject. S. Unger, *Oesterr. Privatr.*, i. p. 163 *et seq.*

The Code Civil, in its 3rd article, expresses itself quite distinctly: "*Les lois concernant l'état et la capacité des personnes régissent les Français même résidant en pas étranger.*" One might infer from that that the legal status

In relation to this question, many writers use the terms domicile, home, and allegiance as interchangeable.<sup>3</sup>

In Roman law, there were two circumstances which determined the permanent connection of a person with a particular territory, viz., *origo* and *domicilium*—origin and place of abode. According to Savigny's view (*System*, viii. § 351, Guthrie, p. 91), the former expression denoted citizenship in a particular community. It took its rise (1) in birth, *i.e.*, in procreation after lawful marriage, for the State where the father had his rights of citizenship, or, in cases of illegitimate birth, where the mother's rights of citizenship lay; (2) in adoption, by which the adopted son acquired the municipal rights of his adoptive father, in addition to those which attached to him by birth, but lost them again by emancipation; (3) in the gift of freedom, by which the freedman acquired the rights of citizenship in the State to which his patron belonged; (4) by enfranchisement, *allectio*—*i.e.*, voluntary admission to the rights of citizenship by the proper authorities of the State.

The rights of citizenship could not be suspended by the will of those who enjoyed them; a partial suspension of them could, however, take place on various grounds, to the effect of releasing the citizen from the burdens which such rights of citizenship imposed, apart altogether from the possible case of a release from these rights and burdens by the competent authorities. In this way, for example, a wife who was legally married to a citizen of a foreign State was released

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and capacity of foreigners in France would fall to be determined, not by the law of their domicile, but by the law of the State of which they are subjects. As, however, the 13th Article of the French Statute Book allows foreigners who have established a domicile in France, with the sanction of the Government, the enjoyment of all *droits civils*, the majority of French authors judge the foreigner who has thus settled in France according to French law. Demangeat, *ut cit.* Pardessus, v. No. 1476. No doubt the Royal Court of Paris, on 13th June, 1814 (*Sirey*, xv. 2, p. 67), decided to the contrary, in finding null the marriage of a Spanish monk with a Frenchwoman, contracted in France, on the ground that a foreigner, in spite of this permission to dwell in France, does not cease to be bound by the laws of his own country, in so far as these concern his personal status and capacity.

<sup>3</sup> *e.g.* Vattel, i. ch. 19, § 219; Eichhorn, § 34; Schäffner, §§ 33, 40; Fœlix, i. p. 58.

from the municipal taxes of her native place so long as her marriage subsisted. The whole of this rule of law rested on the fact that throughout the Roman empire, and even in the provinces, the soil was divided into distinct municipal territories, comprising every farm and village, so that every one belonged to some definite municipal territory. Accordingly, it is plain that any one might belong as a citizen to several municipal communities simultaneously; but it is more doubtful if every person who lived in the Roman empire necessarily belonged to some such community. Savigny assumes that the following persons did not enjoy the status of citizenship in any particular city :—

(1.) Foreigners who happened to be admitted to the Roman empire as inhabitants, but had never been admitted as citizens of any particular city.

(2.) Citizens of any city who had been loosed from its municipal society without having been admitted to any other municipal community.

(3.) Lastly, the freedmen of the lowest class, who were *dediticiorum numero*, and belonged to no particular community.

To determine this question, it is necessary to bear in mind that Caracalla extended to all the provinces the Roman citizenship which had already been communicated to the whole of Italy; and in this way all citizens of provincial towns obtained a twofold municipal status—that of their own city, and that of the city of Rome, since Roman citizenship was merely the right of citizenship in the city of Rome.

Now, before that ordinance of Caracalla, a foreigner had no other way of being admitted to the Roman empire than by a gift of its citizenship from the Roman State—that is, the city of Rome—or from another city belonging to the Roman empire by a gift of its citizenship. Accordingly, the first of Savigny's classes could not exist at this time, nor even after Caracalla. For it is certain that no provincial city or municipium was able to confer a general right of citizenship—even if there had been any such conception, which there plainly was not—without at the same time taking the foreigner into its municipal society; and if the Roman State—or what, in a legal sense, was identical with it, for in

the later days of the empire the municipal authorities of these places are not to be distinguished from the higher municipal authorities—conferred a right of citizenship, that could be none other than the citizenship of Rome. Savigny's first class cannot, therefore, be admitted to have existed.

But, on the following grounds, his second class, too, would be hard to find. A prominent element of the municipal franchise was the duty, known to be very oppressive, of contributing to the taxes of the town, and undertaking its official duties. So general was the endeavour to escape from this oppressive duty, and so strict were the regulations adopted by the magistrates of the Empire to prevent escape, that a State would not easily be permitted to release a citizen from the municipal community unless he was subjected to the burdens of some other township, by acquiring the rights of citizenship there.

The *Dediticii* certainly did not possess the status of citizens of any particular state; they were only capable of enjoying those rights which the Romans classed in the *jus gentium*.<sup>4</sup> It is, however, probable that they did belong to some particular State as passive citizens, if not active. On the opposite assumption they would have had a *privilegium* of exemption from the burden of municipal taxes, which is hardly conceivable in the case of a class of persons under so many legal disabilities. It is far more probable that, belonging, as they did,<sup>5</sup> to the class of freedmen, they would fall to that city in which their patron had his status of citizenship; and, indeed, this inference is irresistible, from what is laid down generally as to freedmen.

Nor does the fact that there is mention made of peoples in the Roman empire who are *sine civitate*, or *ἀπόλιδες*, cast any doubt upon the theory that every inhabitant of the Roman world, with the exception of slaves, who were things in the eye of the law, must either actively or passively have belonged to some definite municipal territory.<sup>6</sup> This expression denotes merely an incapacity for all the legal relations

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<sup>4</sup> Ulp., Frag. xx. § 14.

<sup>5</sup> Puchta. Institutionen, ii. § 213, p. 453.

<sup>6</sup> L. 17, § 1. D. *de pœnis*, 48, 19.

which are comprised in *jus civile*—a kind of municipal death which was associated with certain punishments. “That place is to be held to be a man’s domicile which he has voluntarily chosen as a permanent abode, and, therefore, as the centre of his life as a citizen, and of his business. The notion of permanent abode does not, however, exclude a temporary absence, or the possibility of alteration—reservations which are necessarily implied : all that is meant is, that there is for the present no intention that its endurance shall only be temporary.”<sup>7</sup>

Free will, and fact in correspondence with that will, constituted the essence of domicile by Roman law; and the former alone would suffice neither to set up nor to change a domicile.<sup>8</sup> Exceptions to the free choice of domicile occurred only in the following cases :—

(1.) Wives had the same domicile as their husbands, and retained it as widows until they acquired another.

(2.) Legitimate children followed the domicile of their father, bastards that of their mother, without prejudice to a subsequent choice of domicile for themselves.

(3.) In the same way, freedmen followed the domicile of their patron.<sup>9</sup>

(4.) The state official had his domicile in the place where he was stationed; the soldier, at the seat of his garrison; and the exile, in the place assigned to him for his banishment<sup>10</sup> (cf. Wetzell, Criminalprozess, p. 346, note 51).

<sup>7</sup> Savigny, § 353, Guthrie, p. 97, L. 203, De de V. S. : “*Eam domum unicuique nostrum debere existimari ubi quisque sedes et tabulas haberet suarumque rerum constitutionem fuisset,*” L. 7, C. de incolis, 10, 39. “*Et in eodem loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde quum profectus est peregrinare videtur, quo si rediit peregrinare jam desiit.*” Arndt’s Pandects, § 40; Story, § 43. “It would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom.”

<sup>8</sup> L. 20, 27, § 3; L. 31 D.; *Ad municipalem*, 50, 1.

<sup>9</sup> Savigny, § 353, Guthrie, p. 100. L. 5, *de situ nupt.*, 23, 2. L. 65. D. *de judic.*, 5, 1. L. 38, § 1. D. 50, 1. L. 22. D. Cod. L. 3. L. 4. L. 6, § 1. L. 17, § 11. D. Cod. L. 6, § 3. L. 22. D. Cod.

<sup>10</sup> L. 23, § 1. L. 22, § 3. L. 31, D. 50. 1 L. 7, § 10, D. *de interdict.*, 48, 22.

It was, no doubt, subsequently admitted, after some doubt upon the point, that a man might have more than one domicile, by choosing more than one place at the same time as centres for his activity ; and conversely, a man might be without a *domicilium* altogether. Savigny (§ 354, Guthrie, p. 107) puts the following cases in relation to the latter position :—

(1.) If one domicile had been given up, and a new one was being sought for, until this new one had been selected and established.<sup>11</sup>

(2.) If a man was on his way to the place where the occupation of his life was to be, without having any home there to which he was as yet accustomed to return.<sup>12</sup>

(3.) If a man without any occupation wandered about seeking his livelihood as a vagabond, with some prejudice to public safety.<sup>13</sup>

The fact that every person belonged to a particular municipality (*origo*) imported, according to Savigny, first, an obligation to bear the municipal taxes ; second, legal jurisdiction,<sup>14</sup> so that a person could be sued for all purposes in the place where he as a citizen owed obedience to the magistrates. (Perhaps, however, the application of the *forum originis* of any individual was confined, like that general *forum originis* which all citizens of the empire had, along with some other status of citizenship, in the city of Rome, to the special case of a citizen happening to reside in the city whose citizenship he enjoyed, or to have his domicile in that city as well as his *origo*, since there is hardly any mention of the *forum originis* in the texts).<sup>15</sup> Thirdly, it

<sup>11</sup> L. 5, D. 50, 1 : “*Labeo indicat eum qui pluribus locis ex æquo negotietur, nusquam domicilium habere; quosdam autem dicere refert, pluribus locis eum incolam esse aut domicilium habere.*” L. 6, § 2 ; L. 27, § 2 ; D. cod.

<sup>12</sup> L. 27, § 2, D. 50, 1.

<sup>13</sup> “Among the Romans, domicile, too, always had reference to a definite municipal territory” (Savigny, § 353, Guthrie, p. 97).

<sup>14</sup> L. 29, D. *ad municipalem*, 50, 1 : “*Incola et his magistratibus parere debet apud quos incola est, et illis, apud quos civis erit, nec tantum municipali jurisdictioni in utroque municipio subjectus, verum etiam omnibus publicis muneribus fungi debet.*”

<sup>15</sup> On this and other reasons for the neglect of the *forum originis*, cf. Savigny, § 355, Guthrie, pp. 112, 113.

determined what particular system of law was to be applied to each person. For this assertion there is no immediate and direct authority to be found in the works of Justinian. But the passages<sup>16</sup> which Savigny cites in proof of it establish its truth in earlier times; and in later times it may easily be assumed that, if different territorial laws continued to exist within the Roman empire, it was not the *domicilium*, but rather the *origo*, which determined in Justinian's time also what law should be applied to each individual. But the strongest consideration is that the particular law of any individual was considered to be a *privilegium*, either *odiosum* or *favorabile*, as the case might be, of his status; and it would obviously have been absurd if any person, by the choice of his domicile according to his own pleasure, could have acquired such a *privilegium* of status. In that case every man, at least so long as he might live in Rome and have his domicile there, would have had it in his power to acquire, without any further trouble, the privileges of a Roman citizen in all matters of private rights, even before Caracalla had extended the citizenship to the whole empire. The fact that there is no mention in Justinian's compilations of the operation of the laws of each man's citizenship upon his private rights and status is explained by the consideration that, when the rights of Roman citizenship were opened to all free inhabitants of the empire, the particular systems ceased to exist, although this is denied by Savigny, as we have already noted (cf. *supra*, § 2, note 6).

The effect of domicile, on the other hand, consisted merely in the obligation to pay taxes and to answer to the jurisdiction of courts. The former, which has a purely political bearing, cannot interest us further, and the latter is explained by the Roman jurist by the obedience which was due to the magistrates of the district in which the person had a permanent residence. Neither was an acquisition of rights; both implied the assumption of duties, a fact which is most naturally explained, as Savigny observes, in this way, that the acquisition of a

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<sup>16</sup> Liv. xxxv. 7; Gaius, i. § 22, in connection with i. § 89, iii. §§ 120, 121, 122; Gellius, lib. iv. c. 4.



domicile depends on the caprice of the individual, with which the acquisition of rights is not naturally connected.<sup>17</sup>

The older authors held the connection between personal rights and domicile to be a law of nature, if they ever had it in their minds to make a distinction between domicile and allegiance.<sup>18</sup> At the most, the fact that domicile is universally taken as the foundation of legal jurisdiction, is adduced as a reason for the application of *statuta domicilii* to questions of personal status and capacity (Mevius, *l.c.*, "*Hæc enim a pari procedunt forum alicubi sortiri et statuto loci ligari*"). But the fact on which this depends is no more proved than the consequences which are sought to be drawn from it, for it is necessary to postulate what we have already shown to be an untenable position—viz., that the law which prevails at the place where the court is situated forbids the application of any foreign law. Savigny refers the connection between the laws that touch the personal attributes of any man and his domicile to Roman law. He rightly concludes that it is impossible nowadays to determine legal status and capacity by the municipal laws of citizenship in each particular city; for we no longer enjoy a constitution in which the territory of the State is altogether made up of different burghal communities (§ 358, Guthrie, p. 122). (One may also add, that even if this could be the case in any particular instance, where, for example, a State consisted of a town without any territory outside itself, yet the dissent of the authors, who had not this specialty of the Roman doctrine of *origo* before them, shows that Roman law is not admitted as conclusive on this point.) But Savigny takes another step, and maintains (§ 359, Guthrie, p. 126) that in those cases where any one by Roman law did not enjoy personal rights in

<sup>17</sup> The material advantages of a domicile are enumerated in L. 27, § 1, D. 50, 1: "*Si quis in illo (sc. municipio) vendit, emit, contrahit, in eo foro, balneo, spectaculis utitur, ibi festos dies celebrat omnibus denique municipii commodis fruitur, ibi magis habere domicilium.*"

<sup>18</sup> They frequently draw a distinction between *origo* and *domicilium*, and understand by the former the domicile which belongs to a man by birth, and by the latter the domicile he acquires in later life. Gaill, too (Obs. ii. 36), assumes that the *domicilium originis*, by a German usage at variance with the Roman law, was lost by leaving the place. Cf. Wetzell, p. 347, note 61; Savigny, § 351, Guthrie, p. 87.

any particular city, his personal rights were determined by his domicile. With us this exception has become the general rule, and therefore the principle of the Roman rights of citizenship in some burghal community is also lost, so that personal rights and status are with us fixed by the law of the domicile, and not by the law of the State to which the individual belongs as a subject or a citizen. But, as we have shown, Savigny nowhere proves that any person in the Roman Empire had not the municipal rights of some city ; on the contrary, it is certain that, with the exception perhaps of criminals in prison, whose legal capacity was narrowed to the smallest point possible, and who were treated as civilly dead, every person, in virtue of complete or incomplete citizenship, belonged to some particular municipal territory. Savigny's view, that domicile could have determined the rights of the person among the Romans, rests upon this mistaken assumption. If these rights were in some particular cases not determined by the citizenship of the individual, there must have been some other permanent link to unite that individual to a definite territory and its laws ; that link, as Savigny goes on to infer, could consist in nothing but in domicile. But a direct answer to this theory is made by the proposition adduced by Savigny himself—viz., that domicile, which depends solely upon the caprice of the individual, is not appropriate for the acquisition of rights, and the assumption of another set of personal rights is not a matter to depend on caprice ; it is further answered by the fact that a man may be altogether without a domicile.

If Savigny's view were correct, then if we suppose that an individual did not belong to any municipality either by *origo* or by domicile, his personal status and rights would remain altogether indefinite, which is impossible ; and if it were also the case, as Savigny lays down, that the communication by Caracalla of municipal rights to the provinces was not connected with the abolition of the particular systems of the many separate municipalities, it would not be clear how the Roman jurists, in discussing the question of domicile, should have left this highly important question untouched, or how there should be nothing said on the subject in Justinian's collection. But from the position we have taken up we can

easily resolve all doubt on the subject ;—domicile had no influence upon personal capacity, and after Caracalla's day there were no more separate systems of law for citizens of provincial towns ; and therefore in treating of the law of citizenship no questions of conflict had to be considered ; while, on the other hand, there were no difficulties suggested by the circumstance that a man by having more than one domicile might be sued in more than one place, or have to pay taxes in more than one place ; or again, because he had no domicile, had only to answer to the jurisdiction and pay the taxes of the place to which he belonged as a citizen. If, then, domicile according to Roman law cannot be held to have been the foundation for the legal relations of the individual, it follows as a consequence that, unless there is an universal customary law to that effect, the rules of Roman law as to the acquisition and loss of domicile, and as to the possibility of an individual having several domiciles or none at all, cannot be taken as authoritative for the determination of personal rights even in countries where the Roman law is held as the common law of the land. But it will be hard to show any such universal customary law from the hesitating expressions of the older writers, a hesitation found too, as we have seen, among the more modern writers also, and even in statutes. (Most authors speak without distinction of the conflict of laws in one and the same State and in different States ; in the former case, of course, the municipal laws of citizenship can have no importance).

## B. MODERN LAW.

### § 30.

The question, then, must be determined on general principles of law. Unger<sup>1</sup> determines it on the principle that domicile is the centre of a man's legal existence, and that therefore, as a general rule, it is only in the relations that belong to a man's home that the facts are to be found which affect the constitution and development of that legal existence.

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<sup>1</sup> P. 164, note 2.

But in Roman law domicile was as much the centre of a man's legal existence as it is now, and yet it is certain that the permanent features of status and legal rights were not determined by domicile. Then what is to be the answer if a man has no domicile, or has a plurality? To fall back upon the domicile of his parents in the former case, and in the latter to take his first domicile as fundamental is an expedient dictated by necessity. The former is merely a capricious assumption of a principle for the determination of personal rights, the latter is to deny the principle that has been assumed, because in the particular case it would result in absurd consequences.<sup>2</sup>

As a general proposition, however, the determination of the personal rights of an individual does not depend so much upon his own will as upon the ascertainable purpose of the lawgiver to subject every person to the law which belongs to his permanent relations; although this purpose of the lawgiver may, perhaps indirectly, be made to depend upon a concurrence of the will of the individual concerned.

The State will assuredly not hold persons who have no claim to an abode in its territories as permanently connected with it and its laws. But as it is a recognised principle of international law and policy<sup>3</sup> that foreigners who have not specially acquired right to a permanent abode may be driven out of any territory; domicile in the Roman sense—unless it is coupled with the acquisition of such a special right—cannot open the door to the application of laws that require a permanent state of circumstances to deal with. On the other hand, a foreigner who has acquired such a right, and has at the same time set the centre of his whole life in the territory to which he has migrated, has openly expressed his desire to subject the whole circle of his private life to the State to which that territory belongs, and is accepted by it as a permanent adherent. Now, if the tie which connects such a person with his home was sundered, if he should shift the seat of his habitation to another State, and acquire there a

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<sup>2</sup> Savigny, § 359, Guthrie, p. 130, assumes the law of the earlier domicile as regulative in such a case, because there is no adequate reason for changing it after the acquisition of the second (cf. too, Holzschuher, i. p. 56).

<sup>3</sup> Heffter, *Völkerrecht*, p. 115.

similar right of residence, we should then have a proof that the laws of that State in which an individual has his residence and a right of residence, are to regulate his personal rights.

In modern international law the right of subjects to emigrate to another State is recognised.<sup>4</sup> Upon this the question arises whether, when a right of residence in another State is acquired by a person and his residence is actually transferred to it, his will is expressed to the effect of abandoning connection as a citizen with the State to which he has hitherto belonged. To determine this it is to be remembered that the change of domicile, and the acquisition of a right of residence in another State turn the emigrant into a subject of that other State, and secondly, that it is impossible, in our meaning of the terms, to be the subject of two different States at the same time.

The former is inevitable, because, although the spheres of political rights and of private rights are by modern law so strictly kept apart that the exercise of political rights may depend on conditions quite distinct from the acquisition of a right of residence, still, as there certainly are subjects in every State who do not enjoy political rights, the essence of the condition of a subject consists in that connection of the person and the State which cannot be dissolved by the will of the State alone—*i.e.*, in the acquisition of a right of residence. As to the second consideration, opinions on that subject are divided. Zacharia<sup>5</sup> assumes the possibility of a manifold allegiance as far as the States of the German Confederation are concerned; he does not, however, express himself more particularly as to the relations of a person who may in this sense belong to several of these States. Bluntschli<sup>6</sup> does not consider the union of two laws of domicile in one person to be impossible, and attributes the possibility in part to the civilisation of the present day. If, however, there should result therefrom a real conflict of irreconcilable duties, the older tie of allegiance must take precedence of the newer, and a State, therefore, which should give a foreigner naturalisation or an official position, would find it necessary either to require from him a

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<sup>4</sup> Cf. Pözl in Bluntschli's *Staats-Wörterbuch*, i. p. 580.

<sup>5</sup> *Staats und Bundesrecht*, i. p. 444 (2nd edit.).

<sup>6</sup> *Allgemeines Staatsrecht*, i. pp. 167, 168.

renunciation of his former allegiance, or to allow it to continue and to be preferred to his duty to itself. Unger (p. 293) defines citizenship as the subjection of a man's political personality to a particular sovereign authority, and infers that, as personality is indivisible, no one can be a citizen of several countries at the same time. He assumes, however, that a man's political personality has no connection with his status and rights as an individual, and therefore any one who, by virtue of his residence, belongs to a foreign country in all relations of private law, may yet at the same time belong to the country of his birth as a citizen (p. 164).

According to our view the matter stands thus :—

The tie between the person and the State which is established by a change of residence and an acquisition at the same time of a right of residence, binds the immigrant to be loyal to the State which receives him for a permanence.<sup>7</sup>

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<sup>7</sup> Wheaton (§ 334, p. 396) : "In general, the national character of a person as neutral or enemy is determined by that of his domicile." The Prussian Statute of 31st Dec. 1842, on the acquisition and loss of the character of a Prussian citizen (G. S. 1843, p. 15), agrees with this view, in so far as by § 13 it does not allow residence to confer the character of a Prussian citizen, and by § 12 makes the acquisition of a residence in Prussia dependent on the acquisition of the character of a subject. Cf. too, Hannov. domicil-ordn. of 6th July, 1827, § 5 *ad fin.*

Savigny (§ 359, Guthrie, p. 128) disputes the application of the Prussian statute cited above to the determination of personal status and rights, and lays it down that it relates merely to public law, while by §§ 23, 24, and 25 of the introduction to the Prussian Allgemeines Landrecht, personal rights are to be determined by the residence of the individual, and by that alone, without any distinction between natives and foreigners. But a residence cannot be acquired by any one who has not previously acquired the character of a Prussian subject ; and the further proposition, that by the 13th and 23rd sections of the statute the character of a Prussian citizen cannot be lost merely by residence abroad, is no doubt correct, so far as the mere fact of residence goes, but is no more dealt with in these sections than the false proposition that a residence in a foreign country, coupled with the acquisition of a right of residence there, does not destroy the character of Prussian citizenship. The Allgemeines Landrecht obviously proceeds upon the theory commonly adopted by older authorities, that domicile and the character of a subject are always coincident, without having any clear conception of the distinction between this modern idea of domicile, on which all personal rights and status depend, and Roman domicile, which has no other reference than to a matter of fact and the jurisdiction of courts (cf. § 31, note 24) ; it cannot, therefore, prove anything against the theory we are concerned in maintaining.

This loyalty cannot from its very nature be limited by a similar bond of loyalty to another and totally independent

Code Civ., art. 17.

*La qualité de Français se perdra; 1°, par la naturalisation acquise en pays étranger; 2°, par l'acceptation non autorisée par l'Empereur de fonctions publiques conférées par un gouvernement étranger; 3°, enfin par tout établissement fait en pays étranger, sans esprit de retour. Les établissements de commerce ne pourront jamais être considérées comme ayant été faits sans esprit de retour.*" Cf. Fœlix, i. p. 109.

Brunswick statute as to real property of 12th Oct. 1832, § 24: "He who has acquired the right of residence in the way provided by statute within the limits of this territory is held to be a native."

§ 27. "The right of residence is lost by emigration. Privileges that depend thereon are extinguished by the loss of the character that conferred them, or in consequence of the transgression of particular statutes."

Statute of the Kingdom of Saxony, of 2nd July, 1852, under acquisition and loss of the character of a subject in that kingdom (Statute Book, 1852, p. 241):

"§ 1. The rights of a subject in the Kingdom of Saxony are conferred—(1) By birth, legitimation, and adoption; (2) by marriage; (3) by reception as a citizen; (4) by undertaking a public office."

§ 6. "The acquisition of the character of a subject by reception is effected by a proclamation that it has been bestowed, issued either by our Government or by some official body deputed by Government to discharge all such duties."

§ 7. "Such reception can only be conferred upon such foreigners as can assign some definite place in this country as the seat of their residence, and have obtained a guarantee from the parochial authorities of that place that they will be received into the community of that parish so soon as they have been invested with the character of subjects."

Statute of the Kingdom of Saxony, of 26th Nov. 1834, § 1: "Every citizen of the Kingdom of Saxony must have a home in some district of the kingdom. The commentary of the Statute Book of the Kingdom of Saxony says, § 9: "In transactions which have been undertaken beyond the Kingdom of Saxony by persons who are not subjects of the same, the inquiry must be according to the laws of the place of the transaction, even although there may be some reference therein made to obligations laid upon citizens of Saxony."

In § 10, on the other hand, it is said, "If foreigners take up their residence in the Kingdom of Saxony, their capacity must be determined by the laws that prevail there;" and in § 50, "Political laws and proclamations must determine a man's home, and all the rights and obligations arising therefrom. That place will be treated as a man's domicile which the law has assigned to him, or where he has his principal place of abode." According to this paragraph, the declaration of § 10, that "if foreigners take up their residence in the Kingdom of Saxony, their capacity must be determined by the laws that prevail there," must have reference to the domicile of Roman law.

Whoever is naturalised as a citizen of the States of America must renounce his allegiance to the State of his birth and home, Burge, i. p. 731.

State. The emigrant undoes the bond of loyalty that has hitherto subsisted between him and the State where his home has been, and can no longer consider himself as belonging to it. From this it follows that on emigration from the territory where the laws of a man's home prevail, his personality, not merely in a political sense, but in reference to his private rights and status,<sup>8</sup> goes with him to the State to which he goes.<sup>9</sup>

Feuerbach<sup>10</sup> and Püttlingen (§ 2) express themselves favourably to the view<sup>11</sup> we have maintained.<sup>12</sup>

Heffter (p. 110) lays down that any one may on sufferance become the subject of different States, but that every State has it in its power to forbid any such double character, and may require the character of subject in any foreign country to be abandoned, or offer the individual his choice. But this seems to be no solution of the question which State is to be preferred in the case of a conflict where the subject has made no new choice, or to which State a person truly belongs.<sup>13</sup>

The instance that frequently occurs (cf. German Act of

<sup>8</sup> For even the fact that a person belongs to a particular State as regards his private rights and status presupposes this condition of loyalty or allegiance, as the State on its part is bound to take up and protect the persons who are so related to it.

<sup>9</sup> A person who transfers his residence to another State, and acquires there a right of residence, loses political rights in his native State except in so far as foreigners may be specially privileged to enjoy these. If States which are closely connected with each other accord special permission to their subjects to enjoy political rights in both, this privilege rests on the assumption that no conflict will arise between them, and that therefore it will always be possible to observe the loyalty due to both.

<sup>10</sup> Themis, 1812, p. 323.

<sup>11</sup> Cf. the judgments of American courts on this point, cited in Story, § 45a.

<sup>12</sup> In this connection the convention concluded between Austria, Prussia, and Russia, with reference to the *sujets mixtes* in Galicia, recognises that the character of a subject may be possessed by an individual in more than one country, but with reference solely to property and ownership; it permits only one sovereignty for the individuals themselves.

<sup>13</sup> The theory of a choice is inadequate, since circumstances may occur to render such a choice impossible (as, for instance, when the individual in a time of war finds himself in the enemy's country), and as by the exercise of a choice, either a new legal relation is established, or an existing one is done away with, we have no determination of the question for the time that is past.



Confederation, Art. 18) of what seems to be a double allegiance in the same individual, imports something very like Heffter's theory.<sup>14</sup> But it cannot be meant thereby that a subject of one country who enters upon the service of a foreign country should, during his period of service, be subjected as before to all the duties that are incumbent on a subject of his original country. This would often run directly counter to the duties of his new service, and accordingly, we must necessarily attach the following meaning to it :—No foreigner can have in himself an absolute right to be received into our community ; yet, it is certain that such a right may be expressly conferred or reserved, and that happens when the subject of one country, reserving his rights as such, enters the service of another country, or in some other fashion emigrates. So long as that person is in a foreign country and has not again reverted to his former home, he is a foreigner, and has no duties to our State ; but if he returns, his former rights as a subject revive, and we cannot refuse to receive him into our State. So long as he does not elect to return to the allegiance of his native State, which he can do either expressly or tacitly, although it is never a thing to be assumed as a matter of course, he owes allegiance to no State but to that in which he has been received, and his personal status and rights and his obligations are all determined by the laws of that State. Bluntschli's theory that the State of birth must give its consent to emigration, and that therefore the emigrant must obtain a formal discharge, except in so far as the law of his country expressly permits it, explains his view that the law of the State of birth is the stronger. But, as we have noticed, the opposite principle—viz., that emigration is free—is correct according to modern international law, and the express sanctions of this proposition which we find in the codes of different countries are not exceptions to a rule, but confirmations of the principle.

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<sup>14</sup> Cf. the statute of the Kingdom of Saxony, of 2nd July, 1852, § 20, 2, by which a Saxon who enters the public service of a foreign country without first obtaining the royal sanction, is held to have abandoned his position as a Saxon subject. It follows, therefore, that a Saxon who enters the civil service of a foreign State after obtaining the sanction of his sovereign, retains his position as a Saxon subject.

If then, on the one hand, a person can, in so far as his status and legal relations are concerned, only belong to one State, we have still to consider, on the other hand, whether a person must necessarily belong to some particular State.<sup>15</sup>

It is a sufficient consideration to determine this question that every State is undoubtedly bound, even where its subjects have been discharged from the ties of their allegiance, to receive them back again into that allegiance in so far as they have not been adopted as subjects by another State.<sup>16</sup> If other States should refuse to adopt a person so discharged from his allegiance, he would, if our postulate were not true, have no right to any permanent place of abode in the whole inhabited globe, and there would be no law at all to determine his personal rights. Treaties concluded between States with this object are merely to be regarded as recognitions of this position by way of treaty by the States who are parties to them.<sup>17</sup>

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<sup>15</sup> If the Roman theory of domicile were to determine the question, both must be answered in the negative.

<sup>16</sup> Martens, § 91.C.; cf. also § 4 of the statute of the Kingdom of Saxony, of 3rd July, 1852, dealing with some additions to the statute as to domicile: "If persons who once had rights as subjects in this kingdom, but have lost these from any cause whatever, return under circumstances which make it impracticable to refer them again to any foreign country, then they acquire anew, from the moment when the proclamation to be made by the Minister of the Interior on their account is made (Statute of 2nd July, 1852, § 14), that domicile which they last held before they abandoned their rights as subjects." § 14 of the Statute of 2nd July, 1852: "It is to be considered as admission to the position of a subject if the Minister of the Interior shall proclaim that any individual who has no domicile in the country, or who has lost that domicile, is to be treated as a subject, because he cannot be sent out of it to a foreign country." The operation of this proclamation is by an express addition thereto to be limited to the period during which the actual ground that prevents his expulsion shall last, except in cases in which it shall be previously shown that the addition of such a reservation is impracticable or meaningless.

<sup>17</sup> Cf. 1st section of the Treaty of Gotha between the different Governments of Germany, that has been in force since 1st January, 1852, as to the reception of exiles: "Each of the contracting Governments binds itself:—

"(a.) To receive those individuals back to allegiance who have always continued to be their subjects:

"(b.) And also their former subjects, although they may have lost their position as subjects by the law of their own country, so long as they have not by the laws of any other country been adopted as its subjects."

The validity of the renunciation of allegiance to one State must therefore always be contingent on the condition of a future adoption by some other. It is, of course, obvious that, so long as the person who has renounced his allegiance does not actually return, he can maintain no claim to the exercise of political rights, which, in their very nature, presuppose a permanent attachment to the State of domicile; because a resolution to separate from it, such as is implied in the fact of renunciation, has been openly adopted; that domicile, however, by which the personal qualities of an individual are determined, persists until a new one is acquired. Vattel<sup>18</sup> expresses himself to this effect, and so does Story, on the ground of the practice of the American courts.<sup>19</sup>

But in every case a distinction must be made between the actual establishment of the domicile and the right to do so. It sometimes happens that a man acquires the right to reside at one place, and still continues, as a matter of fact, to reside in his original home, in order, for example, to be able to carry on a trade there.<sup>20</sup>

In such a case the earlier place of residence continues to regulate all questions of a personal kind, and this, as itself a legal relation established once for all, must be assumed as continuing until it is proved to have been given up.<sup>21</sup>

<sup>18</sup> I. ch. 19, § 219.

<sup>19</sup> Story, § 47: "Julian in the Roman law has so affirmed: '*Si quis domicilio relicto naviget vel iter faciat quærens quo se conferat, atque ubi constituat; hunc puto sine domicilio esse.*' But the more correct principle would seem to be, that the original domicile is not gone until a new one has been actually acquired *facto et animo.*"

<sup>20</sup> Cf. Code Napoleon, art. 17, abs. 2. In the case of married men it often depends upon where their families are permanently established, Story, § 46 *ad fin.* Judgment of the Supreme Court at Berlin of 10th Oct. 1857 (Striethorst, xxvi. pp. 233-35).

<sup>21</sup> Fœlix, No. 28, p. 57; Burge, i. p. 34. But Story's view (§ 47 *ad fin.*, and § 48), to the effect that if one has acquired a new domicile, and afterwards is returning to his old home, the domicile of his first home revives during the voyage to it, is not reconcilable with these principles: the voyage must be made on a ship belonging to his first home, and the emigrant must have an absolute right to return. Wheaton expresses himself more cautiously (§ 324, p. 384: "The native character easily reverts, and it requires fewer circumstances to constitute domicile in the case of a native subject than to impress the national character on one who is originally of another country."

In accordance therefore with what has been said, any legal relations of an individual, apart from the exercise of political rights, which, as a general rule, are to be determined by the laws of his home, are to be determined by the laws of that State in which that individual has a residence coupled with a right of residence, that is to say, a right to a permanent abode, which the State cannot of itself put an end to.<sup>22</sup> Most statutes which assign the determination of the legal relations of individuals to the laws of their homes, can be reconciled with this result without much difficulty.<sup>23</sup>

Those laws too<sup>24</sup> and treaties which make personal capacity and rights dependent on the law of the domicile, are to the same effect, in so far as by domicile they do not expressly denote a mere fact, as Roman law did by that term. Indeed, one might almost say that even a domicile in the

<sup>22</sup> A right which is limited to a definite period is not sufficient; nor does it affect the question that, as in England and the United States of America, the authorities of the State make no use of their right to expel foreigners, or allow them to remain only for a succession of limited periods.

<sup>23</sup> A judgment of the Sup. Ct. of App. at Lübeck, on 21st March, 1861, quoted by Seuffert, 14, p. 164, holds it to be a generally recognised proposition of common law, that in questions of succession, it is not the law of the country to which the deceased owed allegiance, but that of the country where he was last domiciled that rules, cf. *infra*, § 107, note 22.

<sup>24</sup> The Code Civil seems to have adopted different principles for foreigners domiciled in France, and for Frenchmen living abroad (cf. C. Civ. art. 3, abs. 3): "*Les lois concernant l'état et la capacité des personnes régissent les Français même résidant en pays étranger;*" and art. 13, "*L'étranger qui aura été admis, par l'autorisation de l'Empereur, à établir son domicile en France, y jouira tous les droits civils tant qu'il continuera d'y résider.*" But Frenchmen residing abroad are, according to art. 17, only those who live abroad, but still retain *esprit de retour*, and so are not really domiciled there. That foreigners living in France should not be liable to have their personal status determined by French law, unless they have established their domicile there by the sanction of the emperor, entirely corresponds with the view we have already submitted. The whole legal position of foreigners domiciled in France with the sanction of the emperor is, however, shaken by the statute of 3rd Dec. 1849, to the effect that such foreigners can be banished from France provisionally by a Minister, or absolutely on the ground of a resolution of the Council of State—Gand, No. 144. By that statute it is established that such persons can no longer be held to be true adherents of the State, and in consequence, French law cannot be adopted for the determination of their legal position and status. But see Gand, No. 145.

Roman sense could not be acquired in any particular State unless at the same time a right to reside there was also acquired, since an individual, who may at any moment be expelled from the place where he wishes to stay, cannot be regarded in a legal sense in the same light as one who has settled himself permanently there. Our view finds a direct confirmation in those statutes which make the acquisition of a domicile by a foreigner dependent on the acquisition of the rights of a subject, or on the special permission of the authorities (cf. *supra*, note 7).

Again, on the other hand, our theory is not contradicted by the statutes which regard the law of the land in which the individual is a citizen as regulating his personal rights and capacity. Domicile, combined with a right of residence, gives rise to nationality, and thereafter to citizenship; for our inquiry it is indifferent whether all political rights are united with a citizenship so acquired or not, since there may be citizens (such as the Jews once were) in all countries who do not enjoy these rights.<sup>25</sup>

This theory, however, makes it impossible that the difficulty of (1) an individual having several domiciles, or (2) having no domicile, should occur (cf. *infra*, § 31, notes 21-23).<sup>26</sup>

### § 31.

To what nation a person belongs is by the laws of all nations closely dependent on descent; it is almost an universal rule that the citizenship of the parents determines it—that of the father where the children are lawful, and where they are bastards that of the mother, without regard to the place of their birth; and that must necessarily be recognised as the correct canon, since nationality is in its essence

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<sup>25</sup> [The Italian courts, which determine all questions of civil rights by nationality, have held that a Jew may have a Tunisian nationality, and his succession be determined by that law, although Jews are not by the Mohammedan law admitted to the full privileges of citizenship—Court of Appeal at Lucca, 8th June, 1880.]

<sup>26</sup> It is merely a practical difficulty in proof to say that domicile or nationality sometimes cannot be ascertained.

On the meaning of domicile in different parts of the same State, cf. § 31, note 24.

dependent on descent. Foundlings must of course constitute an exception to this rule ; they belong to the State in which they are found.<sup>1</sup>

The case of a subsequent legitimation of children seems, however, to be more doubtful. Inasmuch as legitimated children are by law considered to be legitimate, they too must follow their father. But legitimation rests upon a declaration by the father only, and that may possibly work injustice, so that, in strictness, and to ensure the rights of the children, it is impossible to dispense with the sanction of their guardians ; and as this method of terminating guardianship does not belong to the circle of the ordinary obligations and conditions of that office, the sanction must come from the authorities that control all guardians. But in legitimation there is no need of any sanction from the authorities of the State to which the father of the child is subject, because it sets these children on an equality with lawful children, and they enjoy the privileges of subjects as their father does.<sup>2</sup> Nor is there any more need for the consent of the government of the State in which the child has had its home hitherto, unless there be an express provision to that effect in the case of minors.<sup>3</sup>

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<sup>1</sup> Vattel, i. ch. 19, §§ 212, 215 ; Heffter, pp. 108, 109 ; Fœlix, pp. 53, 54 ; Story, § 46 ; cf. also statute of the Kingdom of Saxony, of 2nd July, 1852, §§ 2, 3. Every child born in England becomes an English subject, whether its parents are or are not English (Blackstone, i. 336, except when it is the child of foreigners who are in the country as enemies). Story, § 46, and Gand, No. 242, pronounce against this rule, which is founded on feudal principles, and prevailed in France before the Code Napoleon (Demangeat, i. 55a).

<sup>2</sup> § 4 of the Treaty of Gotha, *ad fin*: "Children, who are legitimated by the subsequent marriage of their parents, will be treated as if lawfully born." Prussian statute of 31st Dec. 1842, § 3: "If the mother of an illegitimate child is a foreigner, and the father a Prussian, the child becomes a Prussian subject by legitimation carried out according to Prussian laws." Cf. statute of the Kingdom of Saxony, of 2nd July, 1852, § 3, "Children born out of wedlock, whose mother at the time of their birth was a foreigner, but whose father was a Saxon, will be held in reference to their allegiance, to have been lawfully born, so soon as they shall be legitimated by the subsequent marriage of their parents."

§ 3. "The adoption of a foreigner by a Saxon does not of itself confer upon him the position of a Saxon subject, as special legitimation does. But the Minister of the Interior can add that quality to the act."

<sup>3</sup> The consent that is demanded on account of the performance of such obligations as military service, does not at present concern us.

That is a consequence of the fact that on universal principles every one has a right to emigrate ; that right cannot be denied to minors, but will rather be embraced for them by the authorities that have the supreme rights of guardianship. Adoption, on the other hand, unless there be a special provision to the contrary, cannot give the adopted child the rights of a subject without the approval of the Government, in respect that adoption rests upon the purely voluntary act of the persons who take part in it (Püttlingen, p. 5), and does not confer upon the person adopted the status of the person who adopts.<sup>4</sup>

On the other hand, another question remains, whether it be the case that, as Fœlix maintains (pp. 97, 98), the adoption of a foreigner by a native, and *vice versa*, has no effect at all. But since (cf. Demangeat, p. 98) even the lawful son of a foreigner can acquire the character of a native, there can be no good ground assigned for pronouncing that, by reason of a difference in nationality between the person who adopts and the person who is adopted, adoption is impossible. All the duties and obligations as to matters of private law which usually arise from this relation, are present in this case also, and therefore there exists the right in the father to fix the domicile of his adopted child by virtue of his power as father. If, then, the adoptive father makes his child acquire a domicile in a foreign State, that must be recognised by the State to which that child originally belonged ; such a step can only be taken in practice, if the Government of the State into which the adopted child is to be taken, permits him to acquire a domicile there. The opposite solution could only be reached by refusing a foreigner the rights of paternal control altogether over a native, and *vice versa*. Dealing as we are solely with the relations of private law, that is not self-evident, but rather, in view of the equal legal capacity of strangers and foreigners in matters of private law, which is to be generally assumed, would require a special statutory provision.

Minor children under their father's guardianship no doubt acquire their allegiance along with him, if they live with him in one family establishment.<sup>5</sup> It is not reasonably to be

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<sup>4</sup> Cf. *supra*, note 2 *ad fin.*

<sup>5</sup> Fœlix, i. p. 106. The provision of the 2nd Article of the French statute of 7th February, 1851, quoted in note *a* by Demangeat, differs from this pro-

supposed that the authorities of the State could have intended, when they received the foreigner permanently into connection as a subject, to break up his family. The same ground does not, however, apply to the case of minor children who have already acquired a separate domicile for themselves. It may, however, be that the two cases will easily be reconciled, if all minor children who are still under the guardianship of their father should be accorded the right of acquiring the character of subjects.<sup>6</sup>

The wife belongs to the State of which her husband is a subject the moment her marriage is concluded.<sup>7</sup> If, for instance, a foreigner married to an Englishman in England is not regarded as an Englishwoman, that does not mean that she is not domiciled there, or has no right to a permanent residence there, but only that she cannot participate in all the privileges which a native-born Englishwoman must be allowed to enjoy over a foreigner in England.<sup>8</sup> By most

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position, in so far as it allows minor children to acquire French citizenship only after attaining majority. This is of a piece with the fact that by French statutes citizenship cannot be acquired or lost by proxy. It is different with regard to domicile (Demangeat on Fœlix, i. p. 56, note *a*); and upon that, according to the view we have taken, depends the allegiance of the party. The statute of the Kingdom of Saxony, of 2nd July, 1852, provides by its 11th section: "The reception of a foreigner into citizenship extends to his wife, and to his children still under his guardianship, unless any individual of their number be expressly excepted."

<sup>6</sup> Fœlix, i. p. 106, is certainly wrong in assuming that the naturalisation of a father must universally carry with it that of his minor children. Cf., too, the Prussian statute of 31st Dec. 1842, § 10: "The communication of the character of a Prussian extends, in so far as an exception thereto is not specially made, to the wife and the minor children who are still under their father's guardianship." The Treaty of Gotha took the completion of the twenty-first year as a limit, after passing which, children should not be dealt with according to the relations enjoyed by their father.

<sup>7</sup> Fœlix, i. p. 104: *C'est la conséquence du lien intime qui unit les époux consacré par toutes les nations, et passé ainsi en principe du droit international.* Code Nap. art. 12; Prussian statute of 31st Dec. 1842, art. 10; Heinrich's Note to the Hanoverian Regulation of Domicile, § 5 *ad fin.*; Story, § 46.

<sup>8</sup> Cf. Demangeat, i. p. 92, 93, note *a*. It is, however, illogical in Demangeat to deny to a foreign woman married to an Englishman those privileges in France which are accorded English people there by virtue of special treaties, on the ground that the British Government, which concluded a treaty for English people, did not intend to make any stipulations for persons whom it did not hold to be English. The word English, in such a



laws, however, a foreign woman married to a native is held to be a native to all effects. All that is matter of doubt is, whether in every case the wife loses her rights as a subject in the State to which both spouses originally belonged, if, after the conclusion of the marriage, the husband enters the community of another State as a subject. Fœlix says, that in that event the earlier rights of a subject enjoyed by the wife cease (i. p. 104); the contrary is asserted by Demangeat, and other French authors cited by him. But Demangeat must concede that the wife necessarily shares her husband's domicile; and, as we have seen, domicile and a right of residence make up the character of a subject, so that in reality the answer he gives to the question is not different; only we must allow a wife who has survived her husband, or has been separated from him, the right to reacquire the position of a subject in her original home.<sup>9</sup> On the other hand, it is a different question whether the wife must necessarily follow her husband, if he, after their marriage is concluded, resolves to change his domicile, and at the same time his State connection. If the husband proposes to emigrate into another civilised State in Europe, the strength and the sanctity of the marriage tie will lead us to answer in the affirmative; but if the emigration is to be to some country beyond the seas, then every case must be decided according to its own circumstances, and with regard to the moving causes for the emigration. It is matter of dispute whether minors can change their domicile, and can emigrate to another State. Many assert that the minor retains the last domicile of his deceased father;<sup>10</sup> others admit a change of domicile, so far as it is not effected by any treacherous purpose of the guardian — *e.g.*, a design to profit by some different law of succession at the minor's expense;<sup>11</sup> others declare themselves universally in favour

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treaty, must be applied to all who belong to that State; not confined to those who have the full rights and privileges of that State.

<sup>9</sup> Cf. Code Civ. art. 19.

<sup>10</sup> So Mornacius, *Observ.* in Cod. 3, 20; Opp. t. iii. p. 328; Bouhier, ch. 21, No. 3, ch. 22, No. 164; Boullenois, ii. p. 69; Story, § 46; Fœlix, i. pp. 55, 56.

<sup>11</sup> So J. Voet, *Comment.* 4, 4, § 10 *ad fin.*

of the possibility of such a change being effected by the guardian.<sup>12</sup> The answer to this question must depend on whether the privilege of changing allegiance is to be considered a highly personal privilege, which a representative is not in a position to exercise. This question, again, must be answered in the negative, by reference to the fact that the domicile of minor children can be changed by their father. But this answer must always be qualified by the proviso that no statute shall expressly provide to the opposite effect.<sup>13</sup> The alteration of domicile can, however, only take place with the approval of the supreme authority charged with guardianship;<sup>14</sup> it is no act of regular administration, and may modify personal rights or personal status, matters of the greatest importance to the ward. Under this limitation, a minor may indubitably change his domicile through his guardian. The ward, his heirs and relations, are, by the necessity of obtaining the consent of the supreme authority, protected against any fraudulent procedure of the guardian that might in some way be directed against the ward's inheritance; whereas the opposite doctrine, by which no change of domicile at all is permitted during minority, might no doubt be very prejudicial for the ward.<sup>15</sup> The termination of majority is, in such a case, to be determined by the law of the State to which the individual belonged at the time, and not by the law of that State into which he proposes to enter.<sup>16</sup> It is only possible

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<sup>12</sup> After much hesitation, Bynkershoek declares finally for the possibility: *Quæst. jur. priv.*, L. i. c. 16; Rodenburg maintains the same absolutely.—Pars. ii. tit. 2, c. 1, § 6.

<sup>13</sup> Cf. Art. 2 of the French statute of 9th February, 1851; Fœlix, p. 106, note a.

<sup>14</sup> Cf. Law of the Kingdom of Saxony, of 2nd July, 1852, § 19, by which the consent of the authorities vested with control of guardianship is required, in order that persons under guardianship may be released from the ties of allegiance.

<sup>15</sup> In Austria, the guardian of a ward who seeks to acquire the rights of citizenship can change his ward's domicile; and it has been so decided, with all the legal results, in English and American courts, when the guardian is in *bona fide*. Unger, i. p. 295; Story, § 506.

<sup>16</sup> Cf. the statute of the Kingdom of Saxony, of 2nd July, 1852, § 8, 1, by which foreigners who desire to be received as subjects of Saxony, must give satisfactory evidence of their legal capacity, according to the law of their previous domicile.

to be received into another State if the connection of the person so to be received with the State to which he has hitherto belonged is severed; and that severance can only take place in accordance with the law of this latter State, except when these laws would come into conflict with universally recognised principles of international law, in which case they need not be recognised by the other State. That cannot, however, be the case with any laws that regulate the limits of minority.

The question whether the State will admit a person in the regular way who is not yet of full age, is quite independent of the present question; and that is the sense in which the provision of the French Legislature—which requires any one who desires to be admitted as a French subject to have completed his twenty-first year—is to be understood. It is not to be understood as though the sole question were as to majority according to French law, and not, at the same time, as to majority by the law of the previous domicile. A widow, on the other hand, cannot be allowed the right of changing the domicile of her minor children.<sup>17</sup> To do so, she would require to represent her children in all legal matters according to the law of her State.<sup>18</sup> There is, of course, no doubt that the children may, with the sanction of the guardian authorities, follow their mother;<sup>19</sup> and we can reconcile without difficulty with this rule the provision so often inserted in treaties from considerations of humanity,<sup>20</sup> by which children up to a certain age are not to be separated from their parents, and are therefore to be received temporarily by the State in which their mother has acquired citizenship.

No general answer can be given to the question whether the assumption of an official position, or the entry upon civil

<sup>17</sup> This is certainly laid down by Fœlix, i. p. 106; cf. on the other hand, the statute of the Kingdom of Saxony, of 2nd July, 1852, § 11, abs. 2: "Children, both legitimate and bastard, of a foreign woman who is received as a subject, remain foreigners, so long as the rights of subjects are not specially conceded to them by the authorities of the State."

<sup>18</sup> Unger, Oesterr. Privatr. i. p. 296, note 29.

<sup>19</sup> Hannov. Domicilordnung of 6th July, 1827, § 2 *ad fin.*

<sup>20</sup> Treaty of Gotha, § 6, Abs. 2.

or military duties, gives rise to a claim to be received as a subject. That can only be submitted to the test of special codes ; and according to them, the acquisition of nationality is, as a rule, united with the assumption of an actual office under Government (cf. Fœlix, i. p. 111 *et seq.*).

Which law is to decide as to nationality, if foreign and native law give different determinations as to the acquisition and loss thereof?<sup>21</sup>

According to the principles we have already laid down, the answer to this question is found without any difficulty. We have seen that the retirement from the community of any State, so long as the person so retiring is not received into any other civilised State, can only be recognised as conditional on a reception into some foreign State which is to follow. It cannot, therefore, be that any individual should not belong to any State ; and the conditions established by the legislature of one State for retirement from its community can only come into operation if the conditions of entry into the new community are at the same time satisfied.

The other case—viz., that the conditions of entry into the new community are satisfied, but that the requirements of the legislature of the State to which the individual has hitherto belonged are not—may be decided by the principle which has also been already mentioned, by which, according to modern international law, every one is free to emigrate to another country. It is left, therefore, to a distinct declaration of will on the part of the emigrant. An exception is permitted in the single case of the emigrant wishing to withdraw himself by stealth from obligations already laid upon him in his domicile, as, for instance, the obligation to military service. In such a case the native State must enjoy the right of forcing the performance of those obligations from the emigrant, although the State into which the person in question was afterwards admitted, is not, by reason of its adoption of that person, now completed and unconditionally binding upon the

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<sup>21</sup> This question, often overlooked, is thrown out by Pfeiffer, Princip. 8, 58. He hesitates, however, as to the answer : " If native law is to decide, a man may come to acquire a domicile in a foreign country which is not recognised there. If, on the other hand, one turns to the law of the foreign country, obviously one is moving in a circle."

Government of the State, bound or even entitled to render assistance to compel fulfilment of that obligation.

It must always be kept in view, that a merely temporary residence is not equivalent to adoption by a State ; such a doctrine would upset the whole conception of allegiance or nationality.<sup>22</sup> It is indispensable that the individual should have specially acquired the right of residing in the foreign State, *i.e.*, of belonging to it, and it is not sufficient that the authorities of the State should not regularly make use of the right which belongs to them of expelling foreigners. Of course, it may be borne in mind here that the former right may be acquired by a residence of a certain duration.

The following case may give rise to doubts. It not unfrequently happens that a man leaves his native land with the purpose of returning to it later, and yet thereafter remains permanently in a foreign country. If he, at the same time, acquires a right of residence in that foreign State, he can no longer be regarded as a subject of the State that was originally his home, although he may never have expressly proclaimed his retirement from connection with it. Emigration, as a rule, depends upon the free will of the emigrant, and although the State of birth may require an express declaration from the emigrant, or a formal renunciation by him of its community, yet this, on the other hand, does not bind the State into which that person may come to be received.<sup>23</sup>

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<sup>22</sup> Mohl, *Staatsrecht, Völkerrecht, und Politik*, i. p. 651, *note* : "Naturally it must be the law of the State in question that shall decide who is to be treated as a citizen and who as a foreigner. It is entirely in its option to make the conditions of naturalisation difficult or easy. So, too, it may deny to a citizen who has been once naturalised, either temporarily or for life, particular political rights, without thereby altering his main characteristic, and denying him protection against foreign countries. On the other hand, it lies in the nature of the thing that the State need not declare those whom it has not yet really admitted into its community to be citizens, nor protect them ; and it is a consequence of elementary legal principles, that the partial fulfilment of the conditions of naturalisation established by law does not at once bring about a change of legal status."

<sup>23</sup> "Time," says the English judge, Sir W. Scott, "is the grand ingredient in constituting domicile. In most cases it is unavoidably conclusive. A special purpose may lead a man to a country, where it shall detain him the whole of his life. Against such a long residence the plea of an original special

The only rule that can be recognised within one and the same State, where the rights of citizenship in particular burghal or landward communities have no meaning save for political purposes or in reference to certain privileges belonging to the citizens of those communities,<sup>24</sup> is the rule of domicile.<sup>25</sup> But, on the same grounds as we stated above in the case of separate States, we must in this case too require that, when one domicile is laid aside in order to establish a new rule of personal status and rights, a new right of residence be acquired, unless there is freedom of immigration, or unless a claim can be made to a right of settlement on any spot in the country.<sup>26</sup> In connection with that comes the consideration, that if we are to speak of the personal status and rights as determined by the law of domicile, we cannot conceive one person as having more than one domicile; and in the same way the subject of a State, in which there may be various particular systems of law, cannot be without a domicile. The rules of the Roman law fail us in this case again; for, as we have seen, personal status never depended, according to that law, upon domicile.

The governing principle here is the purpose of the person in question to subject himself permanently to one or the other

purpose could not be averred." The Harmony, Rob. Adm., Rep. ii. p. 324; cf. Wheaton, part iv. c. 1, § 322.

<sup>24</sup> That exceptions to this rule do occur, and that, for instance, the statutory provision that the law of inheritance to spouses depends on the law of the community of which the husband is a citizen, is not to be denied. But limitations of that sort, with regard to persons who have acquired the right of citizenship, are never to be presumed in the region of private law, and it is with it alone that we are here concerned. Besides, if these exceptions are more closely examined, they are only apparent. Non-citizens as well as citizens are subject to the law that prevails in the community, but the latter have, in addition, a special law of status. Cf. the next note.

<sup>25</sup> Pufendorf, *Observ. Juris. i. obs. 82*: "*Incolis quoque non exentis domicilium in civitate (city) habentibus ex jure civitatis succeditur, etsi jus civitatis non habeant. Et ita Senatus Cellensis judicavit, 18th Oct. 1789.*" We may without difficulty add to that the case of particular rules of law within a particular district being applicable to full citizens only, or other rules being inapplicable to excepted persons. Gerber, *D. Privatr.*, § 52; Eichhorn, § 375.

<sup>26</sup> Cf., for example, the law of the Kingdom of Saxony, of 26th November, 1834, and the Hanoverian regulation as to domicile.

local system of law, and the realisation of this purpose by a permanent residence in this or in that place; and therefore, too, if we suppose a case, which may most undoubtedly happen, that any man actually has an establishment in several places, it is not necessary<sup>27</sup> that the domicile which is older in fact should prevail, but rather we must determine the local system which is to regulate the case according to its particular circumstances.<sup>28</sup>

Domicile in the sense of the Roman law<sup>29</sup> is, however, even at the present day, not without meaning.

Indeed, it may be said to have retained in full the meaning which it had in Roman law. In questions of the jurisdiction of courts, most systems allow it to prevail; and, generally, where relations depending purely on fact—as, for instance, the regulation of a transaction which the parties are free to determine by the usages of this or that country—are in question, it is the actual domicile, and not the acquisition of a right of residence or of allegiance, that we must regard, if the laws of the domicile of the parties are to rule the question at issue. We shall come to be more familiar

<sup>27</sup> Savigny, § 359, Guthrie, p. 129, would have the earlier domicile prevail absolutely.

<sup>28</sup> Story agrees with this, § 45 *et seq.*; see too the decisions cited there, and by Düring in the Magazine of Hanoverian Law, 7, pp. 48-54 (cf. the decision there cited of the Supreme Court at Celle, and the paper in the Magazine of Hanoverian Law, 4, extra vol. p. 80). The earlier domicile will only rule when there is doubt whether there are reasons sufficiently strong for the application of the local law of the subsequent domicile.

<sup>29</sup> The reader should not think that to decide personal status and rights by allegiance, instead of by the actual fact of domicile, does not frequently lead to difficulties (see, for example, the case put by Warnkönig in the Gerichtssaal, 1857, p. 59, who declares himself to prefer the rule of the actual domicile). It may be that a man lives for a long time in a foreign country, establishes a great trading or manufacturing business there, and yet his succession cannot be regulated by the law of that country. The opposite view, however, has certainly greater difficulties, even putting out of view the insoluble difficulty of a double domicile. To balance the various circumstances, from which we have to infer the *animus remanendi* or the *animus redeundi* is very difficult. According to our theory the person whose succession is to be settled can obviate all difficulties by obtaining the right of residence, whereas, according to the opposite view, there is nothing to prevent a residence which may be in his mind merely temporary being treated as a change of domicile.

with the meaning of this principle in the law of commerce at a later stage.<sup>30</sup>

*Note A—on §§ 30, 31.*

[The doctrine enunciated in the text, that private rights and status are to be determined by domicile, coupled with a right of residence—that is to say, by a condition of things that approaches more closely to citizenship or nationality than to mere domicile—is not a doctrine that has ever been received with favour in this country. The domicile, and not the nationality of a person, is with us the criterion. “The civil status is governed universally by one single principle, namely that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party—that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy—must depend” (per Lord Westbury, in the House of Lords, *Udny v. Udny*, 1869; 7 Macp. H. of L., p. 89, and L. R. 1 Scotch Appeals, 457). The legal condition called domicile cannot arise without the fact of residence, and the intention of permanent residence; but no such idea of citizenship or nationality as is at the bottom of the criterion for civil status suggested by the author is involved in it, unless it be merely as an element of evidence to prove the permanence of the intention. It would be quite out of place, then, to cite here any of the English or Scottish authorities on this subject; and it would also be superfluous to do so, since a reference to Dicey on Domicile will give the most copious information on the subject.

The laws of Prussia, and Austria, and the United States, like those of England and Scotland, determine civil status

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<sup>30</sup> Although the determination of questions of personal status depends upon the acquisition of a right of residence, and the decision of that question is in many countries a matter for the Government to determine, yet the decision of these officials cannot, of course, have any effect upon law-suits in which the question of the determination of personal status, and consequently the question as to whether a right of residence was or was not acquired at some earlier point of time, is raised. In this case, the decision, upon the one hand, is left entirely to the court; but that decision settles nothing, upon the other hand, with regard to the position and treatment of the persons concerned as citizens. Cf. Wächter, *Criminal Law of Saxony*, p. 133, note 4.



and rights by the law of the domicile. Italy, France, Belgium, and Switzerland adopt the principle of nationality, giving, however, to a foreigner who is permanently resident in their territories, and has authority from the Government to remain, almost all the privileges of citizenship. In short, they adopt the principle maintained in the text.

But although nationality has not, by the law of Great Britain or of most of the German States, any effect upon the status and capacity of persons, it will not be out of place here to refer briefly to the means provided for the acquisition of the character of citizen and the loss of that character in these countries ; in Germany, by the law of 1st June, 1870, and 16th April, 1871, formerly applicable to the North German Bund, now to the whole empire ; in England, by the Naturalisation Act of 1870, 33 & 34 Vict. c. 14, by denization, and by the common law. By the German statute, the quality of citizenship is acquired either (1) by descent ; (2) by legitimation ; (3) by marriage ; (4) by reception (*Annahme*), in the case of a citizen passing from one State of the empire to another ; (5) by naturalisation in the case of foreigners. Neither adoption nor domicile will give the quality of citizen. Foreigners are admitted to be naturalised on proof that they are *sui juris* by their own law, and of good character ; that they have a residence or trading establishment in Germany ; and that they have the means of providing for themselves and their families. Naturalisation and reception are both acts of the Government.

In Great Britain the character of citizen is acquired (1) by birth in Great Britain or the dominions of the Queen ; (2) by descent (4 Geo. II. c. 21, § 1) ; (3) by naturalisation, denization, and resumption of British nationality. Denization is granted by the Crown ; naturalisation by a Secretary of State on application made to him by persons who have resided for five years in the United Kingdom, or served under the Crown for that period, and intend to continue so residing or serving ; resumption of nationality is effected on the same conditions by British subjects who have become aliens, and, therefore, by a widow who has been married to an alien. Naturalisation and resumption of nationality carry the rights of citizenship to infant children residing with their father or mother.

The quality of citizenship is lost in Germany (1) by discharge on petition ; (2) by order of the Government ; (3) by a residence of ten years abroad ; (4) by the legitimization of bastard children of a German mother whose father belongs to another nationality ; (5) in the case of women, by marriage. A petition for discharge in conformity with the doctrine of the text cannot be refused except in the case of persons who are or will be subject to military service.

The character is lost in England (1) by a declaration of alienage taken by a person born in England of foreign parents, or born abroad of English persons, on being of full age and not under legal disability ; (2) by naturalisation in another State ; (3) in the case of women, by marriage.

In Germany, the loss and acquisition of the character of a citizen are by statute made to produce the same effect upon the wife and minor children of any person so acquiring or losing his citizenship ; and the importance of citizenship lies largely in the obligation to military service which it implies.

In America, by an Act of Congress of 27th July, 1868, the freedom of expatriation claimed in the text for all citizens is most fully conceded. It is declared to be contrary to the fundamental principles of government that any functionary should give any declaration, opinion, order, or decision to the effect of restraining or questioning the right of expatriation. In the Presidential Message of 7th December, 1875, it is said : " Our legislation does not indicate when and how American citizens may renounce their nationality." The acquisition of citizenship is not difficult ; within the Union, the citizen of one State giving up his residence there, and going to another to reside, may by this means change his allegiance.

In countries where nationality holds the place which domicile does with us, and particularly in France, various interesting questions have been presented as to the effect of a change of nationality by the head of the family upon the other members of it. But before proceeding to these cases, it is first to be noted that civil rights have been conceded to foreigners living under Government authorisation in France. Such persons have a domicile there, sufficient to entitle them to sue other foreigners in the French courts (C. de Cassation, 12th January, 1869). The same privilege is even conceded

to a foreigner long resident in France, and carrying on business there (*Lortsch v. Lindheimer*, 23rd October, 1877, Trib. Comm. de la Seine). An equivalent to authorisation has also been recognised in residence under certain conditions and for a certain period, to the effect of founding a domicile which will regulate succession (*Dubouchet*, 16th December, 1879, Trib. Civ. de la Seine). But the general rule as to change of nationality is to the following effect:—"It is a principle of law that nationality is acquired by birth; once acquired, it can only be changed in certain specified ways, and by certain fixed rules. The will of the father is not one of these ways; on the contrary, it is the will of the person whose nationality is in question that must be taken into consideration. In other words, the nationality of children is a personal quality which the law has not empowered any representative to alter" (*Fillinger v. Prefet de la Loire*, Trib. Civ. de Montlaizon, 25th Jan. 1877). A father cannot by changing his nationality alter that of his minor children, in spite of what the foreign law may assert (*C. de Paris*, 19th March, 1875; *Laherty v. Prefet de l'Ariège*, *C. de Toulouse*, 26th January, 1876). A father, for example, was born in Elsass, and was resident there; his children were born in Paris. On the cession of Elsass to Germany, the father became, by the terms of the treaty, a German, but his pupil children will remain French. No one can rob them of so highly personal a quality against their will or without an act of their own (*Stein v. Stein*, *C. de Cassation*, 6th November, 1877). Similarly, a child born in Switzerland, his father being then French, is French from his birth, and cannot lose that nationality by the subsequent naturalisation of his father in Switzerland (*Constantin*, *C. de Cassation*, 1874; also, *C. de Lyon*, 19th November, 1875, case of *Fabre*). "The right of nationality is so precious a possession, and so essentially personal, that it cannot be lost or affected by the act of any representative or by parties who are not of full capacity" (*Courts of Metz and Strasburg*, 11th May and 23rd June, 1876, applying the rule of French law). This practice is, as we have seen, contrary to the law of England and of Germany. The true *ratio* is in many cases the desire to retain as Frenchmen youths of the military age, but this consideration has not overcome the

more humane and equally reasonable law of Germany. This practice, too, is repudiated in Belgium, where the principle of nationality is also adopted as decisive of civil rights and status (Schoup, 31st Jan., 1876, C. de Cassation, Brussels; and other cases). It has been held there, that to maintain the unity of the family should be the first object of the law, and that therefore the father by a change of nationality should be held to change that of children in family with him.

French law goes so far as to import this independence in questions of nationality to some extent into the relation of husband and wife. The wife by marriage is held to acquire the same nationality as her husband; marriage being an act of her free will, the consequences of which she must be held to have in view. So long as that marriage subsists, she is bound by the law of the country to which her husband belongs. But, on the one hand, where a French lady, a minor, was married to a foreigner, and a question was raised as to whether such a marriage was or was not null in respect of her minority, a plea that by the marriage she had changed her nationality, and that the rules of French law were thereby excluded, was rejected as being a *petitio principii*. On the other hand, there is recognised in France this very equitable doctrine: that where a woman is married to a Frenchman, and the parties have had a matrimonial domicile in France, the husband's country, the husband is not entitled to leave France and obtain naturalisation abroad with a view to altering the conditions required for a separation or divorce, or the consequences that will result from such procedure. In such a case, the woman can appeal to the courts of the country, to which by her marriage she has become attached, and, since she has not expressed any *voluntas* to change her nationality, it will, in spite of the change effected by the husband, be held to continue French. Conversely, a woman separated from her husband in France, where there is no divorce, cannot, by obtaining naturalisation in another country where divorce is permissible, enjoy the benefits of that foreign law. The cases illustrative of this doctrine are more fully cited *infra* note on § 92.

The doctrine that nationality is regulative of succession is not very rigidly maintained, since residence of some duration and the manifestation of an intention to remain have been

held sufficient to put the succession of a deceased person under French law (see *infra* note on § 107).

Nationality once acquired cannot be lost, except by the observance of certain fixed forms (cf. *Fillinger v. Prefet de la Loire, ut supra*). A fixed intention to do so must at least be established; and to draw in a foreign conscription has been held in France insufficient to show such an intention, there not having been any express renunciation of French nationality (*Cercelet, Trib. Civ. de Charleville*). A native of Switzerland who had been naturalised in America, returned after the lapse of several years, for a temporary purpose, to Switzerland. He was there placed under interdiction as a prodigal; he pleaded his foreign naturalisation, but his plea was repelled because he had not renounced his Swiss nationality in the prescribed manner (*Gothney, Trib. Fédér., 10th June, 1876*). A case is reported from the mixed courts of Egypt, which are open only to the subjects of those foreign nations for whose behoof they were constituted. An Ottoman subject desired to sue in the French Court; but on its being shown to the judge that a subject of that empire cannot change his nationality without license from Government, his suit was dismissed as incompetent (*Osman Rhaleb Bey v. The Governor of Cairo, 10th April, 1876*). But a less rigid rule has been occasionally applied in France, whereby, for instance, it has been held that one taking service under a foreign Power shows an intention of throwing off French nationality, to which effect must be given (*Bartholoni v. Prince de Lucinge, Trib. Civ. de la Seine*). The rule is that a clear and deliberate intention to renounce the nationality of origin must receive effect (*Code Civ. § 9, and Barbet v. Dhainaut, C. de Cass., 4th May, 1881*). But such a change cannot affect the rights or status of third parties, such as a wife or children.

As by the law of Germany, so too by that of France, a bastard, who has the nationality of his mother, acquires, on legitimation by the marriage of his parents, the nationality of his father (*Carmellini, 13th March, 1879, Tribunal d'Albertville*); this decision does not fully accord with the theory stated so forcibly in French law as to the impossibility of altering a status of nationality once acquired in any other way than by an exercise of will on the part of the person whose nationality is

in question. The explanation probably is, that the declaration of paternity required in such circumstances by the French law proves that in truth the foreign nationality never belonged to the child.]

IV. HAS THE JUDGE ONLY TO APPLY FOREIGN LAW UPON THE MOTION OF THE PARTIES, OR IS IT *pars judicis* TO DO SO? HOW IS THE FOREIGN LAW PROVED, AND WHAT ARE THE CONSEQUENCES IF IT SHALL NOT BE APPLIED, OR SHALL BE MISUNDERSTOOD?<sup>1</sup>

### § 32.

1. There are three different opinions upon the question first stated in this title. According to the strict construction of the first of these, foreign law is merely a fact for the judge, and must be treated solely as a fact in matters of process; and accordingly the judge is not required in any case to apply foreign rules of law without an express motion to that effect being made to him by the parties.<sup>2</sup>

The opposite view demands that, if foreign law is to be applied, its application shall not be left to depend upon the

<sup>1</sup> There can be no dispute—in view of principles universally recognised in the civilised world, by which, in matters of criminal law, there is no recognition of the choice of parties, and no opportunity given to them to determine whether a particular act shall be punished, and if so, with what punishment—that, as far as the criminal laws of foreign countries are concerned, they do not in any degree depend upon the initiative of parties; and, therefore, in this paragraph no further mention of criminal law will be made.

<sup>2</sup> Oppenheim, *Völkerrecht*, p. 381. Judgment of the Supreme Court at Lübeck, of 10th December, 1853 (Seuffert, 8, p. 124), that the rule, "*locus regit actum*," is to be held as a good plea for the defender, if the law of the place where the contract was made differs from that of the place where the court is situated. To the same effect is the judgment of the Supreme Court at Rostock, cited by Seuffert, 8, p. 2. Then the Supreme Court at Lübeck, on 14th September, 1850, laid down that if this rule was pleaded on appeal, it could not be departed from (Römer, 2, p. 400). Judgment of the High Court at Berlin, on 19th May, 1857 (Striethorst, 26, p. 49): "In reference to matters which are to be determined by foreign laws, the existence of the statute or law seems to be a fact which must be proved if it is disputed" (Draft of a Commercial Code for Wurtemberg, art. 997). Judgment of the High Court at Darmstadt, on 12th October, 1850: "The mere assertion that the contract is invalid according to the law of a foreign country where it was concluded, that being the law to be applied here, is not to be taken as conclusive" (Seuffert, 9, p. 279).

motion of the parties, and that the party who appeals to foreign law shall only be bound to prove what it is in case it may be held necessary by the court to call for such proof. A difference of opinion obtains among the adherents of this theory, in so far as some require proof of the foreign law in every case;<sup>3</sup> others only in those instances where the judge has not an adequate knowledge of that law without some such proof.<sup>4</sup>

An intermediate but less prevalent opinion holds it competent for the judge to apply foreign law, but not imperative that he should do so.<sup>5</sup>

If one proceeds, as we have done, upon the assumption that the application of foreign laws rests upon an express or implied provision of the domestic law, which commits the decision of the particular question to the laws of another country, there can be little doubt of the soundness of the second theory. The opposite view leaves the rules of law which are to be applied to the pleasure of the parties, and obliges the judge—since he can only regard foreign law as a fact, and only take it as parties shall present it to him in the process—to decide upon what may be very strange

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<sup>3</sup> Judgment of the Supreme Court at Lübeck, of 10th December, 1823 (Seuffert, 4, p. 168; Reyscher, Wurtemberg Privatr. § 81). The 53rd section, i. 10, of the General Court Regulations in Prussia provides that proof shall be taken upon foreign law as upon any other fact. (Cf. on this provision the judgment of the High Court at Berlin, of 23rd October, 1855, Striethorst, 18, pp. 233, 34: "It seems, then, to be not doubtful, and has been assumed in the judgment of the High Court up to this time, that the pursuer, who has produced a protest which bears *ex facie* to have been taken by a notary in his official capacity, cannot be required to disprove the existence of rules of English commercial law on this subject which detract from its validity; rather it is the defender's business to specify the existence of such exceptions against this protest, and with this view to undertake the burden of proving the foreign statute or law.")

<sup>4</sup> Wächter, i. p. 310. A more recent judgment of the Supreme Court at Lübeck, of the 13th January, 1857, recognises, in contradiction to the earlier cited decisions of the same court, that the judge may apply forthwith any foreign law with which he is familiar. The practice of the Supreme Court of Appeal at Cassel follows this (Stirpelpman, i. p. 57 *et seq.*). To the list of adherents of this theory are to be added all those who hold that for the purpose in question foreign law is to be treated after the analogy of a customary law (cf. Savigny, i. p. 191; Mittermaier, Archiv. for Civil Practice, 18 p. 67 *et seq.*; Seuffert, Comment. i. p. 235; and Unger, i. p. 306, note 40).

<sup>5</sup> Kori, Discussions, iii. p. 29.

principles of law.<sup>6</sup> The intermediate view, which commits the matter to the pleasure of the judge, is at variance with the nature of the judicial office.<sup>7</sup>

On the other hand, if a party to a suit does not appeal to foreign law, it cannot be said that he thereby impliedly submits himself to his own law. For, as a judgment of a Supreme Court notices,<sup>8</sup> we may assume that it is only by an oversight that the party against whom judgment goes has not appealed to foreign law.

From a practical point of view, objection has been taken to the theory we have adopted, on the ground that it must often involve the judge in unprofitable difficulties,<sup>9</sup> and that he cannot be expected to have a knowledge of foreign law. The latter objection is so far well founded that no judge can be blamed for omitting to apply foreign law where parties have not appealed to it, as if he had failed in the discharge of his duty. But the former consideration proves nothing. Very many rules of law, the object of which is nothing more than the maintenance of some legal principles beyond themselves, lead in many cases to discussions which are of no practical value, and must yet be respected. We may, however, concede this much—

If the contentions of parties are founded on native law, and the judge has no particular knowledge that the one contention or the other is by foreign law, which must supply the decision of the point if a strict view be taken of it, entirely unfounded, he may in giving judgment proceed on the assumption that the foreign and native law are at one upon the point in question; and the question whether a foreign law is to be applied, and if so, which, may be left out of sight in the judgment as unnecessary to be stirred. This arises from the fact that there are very many rules of law in the different systems of civilised peoples which entirely coincide with each other; and this agreement may reasonably be assumed to exist, if the contentions of parties are, according

<sup>6</sup> Cf. on the other hand, Kritz, ii. p. 95; Schäffner, p. 208.

<sup>7</sup> Cf. on the other hand, Wächter, i. 310.

<sup>8</sup> Judgment of the Supreme Court of Appeal at Lübeck, on 30th January, 1850 (Seuffert, 9, p. 327).

<sup>9</sup> Cf. Art. 997 of the Draft Commercial Code for Würtemberg, p. 764.



to the facts alleged by them, in conformity with the native law of the judge, while no appeal has been made to foreign law.<sup>10</sup> Were it not for this assumption, the simplest rules which are indispensable to the law of any civilised State, would have to be sent to proof in any process in which they happened to be involved.

II. The burden of proof is determined in the same way: the proof is upon that party who alleges a difference from the law of the country where the suit depends. But the presumption of legality must make for instruments officially drawn up in a foreign country, and therefore the burden of proof, as an exception to the general rule, does not lie upon the person producing such a document, if the form of its execution does not correspond with that prescribed by the laws of the country where the court is situated.<sup>11</sup>

As regards the procedure in proving the foreign law, it will be conducted in the same way as a proof of a usage of trade or other usage.<sup>12</sup> The judge is not confined to materials which the parties may lay before him, but it is his duty to supply himself with means of proof independently of their aid.<sup>13</sup> The opposite party, too, in accordance with this rule,

<sup>10</sup> Cf. the Draft of a Civil Code for the Kingdom of Saxony, § 9, abs. 2: "If, however, the foreign law is not notorious, or is not referred to, the judgment shall be according to native law, and in so far as this rests upon peculiar enactments, according to natural principles of law" (but see *infra*, § 105, note 14 *ad fin.*).

<sup>11</sup> Cf. however, the judgment of the Supreme Court of Appeal at Darmstadt, on 14th Sept. 1854 (Borchardt, p. 243), by which the pursuer is required to lead proof that a protest executed abroad, which does not satisfy the requirements of the German Commercial Regulations, is in conformity with the rules of the foreign law. This decision is explained by the peculiar nature of the instrument in question—viz., a protested bill, the legal meaning of which is the same in the law merchant of all European States, as the Supreme Court at Berlin has held (cf. Borchardt, *loc. cit.*).

<sup>12</sup> In England and America, the court, and not the jury, decides whether a particular rule of law holds in the foreign country (Story, § 638).

<sup>13</sup> Cf. judgment of the Supreme Court of Appeal at Rostock, 16th Nov. 1843 (Seuffert, xii. p. 111), and judgment of the Supreme Court of Appeal at Cassel, 1st April, 1859 (Seuffert, xii. p. 254). A judgment of the Supreme Court of Appeal at Lübeck, 22nd Dec. 1856 (Seuffert, xiii. p. 253), held that the court could have no official knowledge of foreign law, and therefore, if the rules of law in question should not be notorious, must acquaint itself with them by proof.

could not be forbidden to produce new evidence even after the expiration of the period allowed for proof; but as the law-suit must necessarily come to an end, and as the party who appeals to foreign law would, if the judge were bound to consider evidence so produced, have the privilege of protracting the suit at his pleasure by tendering evidence after the proper time, but still before judgment was given, it seems necessary to exclude the evidence tendered after the expiration of the period of proof, and the judge will have to reject all such memorials without considering their contents, in case a foundation for a proof in replication should not have been laid: they may always be admitted by agreement of parties.

Everything may be used as evidence which can convince the judge of the validity of the alleged rule of law at the time of the inquiry,<sup>14</sup> but no evidence is admitted the weight of which substantially depends on the agreement of the parties. Admissions,<sup>15</sup> therefore, and references to oath, are excluded, except when the latter are to be employed to prove particular facts that bear witness to a foreign law of custom.<sup>16</sup> To admit such evidence would in certain circumstances force a judge to decide contrary to his conviction, according to rules of law which as a matter of fact do not exist. The best evidence as to the existence of any rule of law is no doubt the testimony of foreign courts and counsel of reputation, since in the case of statutes formally published there may yet be some contrary course of practice or customary reading of them, which the judge, with nothing but the text of the statute before him, might never discover; and besides, the judge may not have at his command sufficient material to enable him to understand the statute.<sup>17</sup> A decision, however,

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<sup>14</sup> Story, § 639.

<sup>15</sup> See Schäffner, p. 209, who, however, is disposed to admit reference to oath.

<sup>16</sup> Mittermaier (Archiv. xviii. p. 80) excludes reference to oath, as a rule, but allows (p. 75) admissions. That can only be justified to this extent, that if a judge has no definite means of informing himself as to foreign law, he may assume, upon the admission of parties, that it is in conformity with native law.

<sup>17</sup> A rescript of the Royal Prussian Ministry of Justice, dated 8th Dec. 1819, declares for the Courts of Prussia, that the proof of any English doctrine of law may best be obtained by the opinion of two English counsel, but that the

may be pronounced on the authority of recognised and complete treatises, when they determine the question.<sup>18</sup> But the citation of an isolated passage must be regarded as insufficient without the testimony of foreign courts or counsel in explanation of its meaning, since the signification of a rule of law is substantially affected by its relation to other kindred propositions.<sup>19</sup>

But in view of the possibility of change in any special rules of law, it is not enough to prove that they have been enacted.<sup>20</sup> The judge must be persuaded of their continued validity, and the presumption in favour of the constant existence of legal propositions that have once been established is not to be applied any further in this case than in the case of native law. No doubt it may without difficulty be assumed that statutes which have not been made public for any great length of time are still in force.<sup>21</sup>

III. Since the application of foreign law is founded on the express or implied directions of the native law, the consequences of omitting to apply them, or applying them wrongly, are just

repute of these persons as counsel of eminence must depend on notoriety, or must be properly authenticated, and the opinion must be legally correct: the other party is not permitted to adduce an opinion in the opposite sense to refute the one first obtained.

In France, usages were proved by *Actes de Notoriété* of the French courts at one time. But now the right of the courts to do so is questioned. According to the opinion of various learned lawyers, the testimony of foreign courts will be received as satisfactory (Mittermaier, p. 80).

<sup>18</sup> The text must be authentic. In England, it is necessary that it should be authenticated by the foreign Government or its officers, whose signature, again, must be properly legalised (Story, §§ 640-41). In America, "by express statutory enactment, printed copies of the statutes of any other State, purporting to be published by authority, are admitted as *prima facie* evidence of such laws" (Story, 641a).

<sup>19</sup> A special authentication of the text may often be necessary (cf. Mittermaier, pp. 84, 85).

<sup>20</sup> Mittermaier is of a different opinion (p. 74).

<sup>21</sup> The reasons we have already cited for according to witnesses of repute a preference, as a rule, over an inspection of the text of the law itself, indicate that we should submit the question to the foreign court adapted as far as may be to the particular case in hand; but we should never commit the decision of the whole question to the opinion of a foreign tribunal or foreign counsel, as Pütter thinks (Fremdr. p. 136); in any case, the evidence given has no further weight than in so far as the legal proposition is shown to be undisputed.

the same as would flow from an infringement of any native law. But in the general case, an infringement of the *jus clarum in thesi* cannot take place in disposing of a case according to the territorial laws of one State or another, since it is unusual that directions should be given for the application of any particular foreign law ; and so all legal remedies to which such an infringement is a necessary preliminary are excluded, at least, unless an infringement of a rule established by the law of custom is sufficient to call these remedies into action, and it can be established that a custom of applying foreign law in the particular instance does prevail.

The ordinary right of appeal must be conceded in this case, and that although no reference has been made to foreign law in the first instance.<sup>22</sup> On the other hand, the penalty of nullity which is attached to the infringement of an obvious rule of law cannot be held as attaching to such a case as this, unless the application of the foreign rule of law were set beyond all doubt by a course of practice.<sup>23</sup>

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<sup>22</sup> Kori, p. 29. The opposite view must be adopted if foreign law be merely viewed as a fact. So the judgment of the Supreme Court of Appeal at Dresden, in Dec. 1855 (Seuffert, xi. p. 321).

<sup>23</sup> Judgment of the Supreme Court of Appeal at Darmstadt, 20th Dec. 1853 (Seuffert, ix. p. 327). "No nullity attaches, by reason of the disregard of a foreign statute by the judge, unless the parties shall have expressly referred him to it." According to French practice, it is only where a treaty or a special provision of French law prescribes that a foreign law is to be taken into account, that a failure to do so is reckoned as a ground for reviewing the judgment (Pardessus, v. No. 1494, under reference to the judgment of the Appeal Court of Paris, 7th Fructidor, an. 7 ; 18th Févr. 1807 ; 15th Juillet, 1811). See, too, a judgment of the same court of 1st Feb. 1813 (Sirey, xiii. i. p. 123).

[The principles as to the application of foreign law in English and Scottish courts are practically in accordance with the text, particularly in requiring fresh proof in each case, and in refusing to rely upon the language of statutes, or the continuance of a practice without evidence from a skilled person. Although it is still competent both in England and Scotland to ascertain by a judicial remit what is the law of any foreign country, England and Scotland being for this purpose considered as foreign one to another, parties now more commonly resort to the provisions of the Statutes 22 & 23 Vict. c. 63, and 24 Vict. c. 11. The former Act applies to cases where Scottish courts desire information as to English law, or *vice versa*, the latter to cases where courts in the United Kingdom desire to be informed as to foreign law. The provisions in both cases are, that where it shall be the opinion of any court that it is necessary or expedient for the proper disposal of any action to ascertain what is

## V. CONCLUDING REMARKS.

## § 33.

## ON PROHIBITORY LAWS.

Whatever may be the differences of opinion as to the principles of private international law, all authors recognise certain exceptional cases in which the judge is driven back upon his native law, instead of being allowed or required to recognise principles which in other cases would demand the application of foreign law.<sup>1</sup>

These cases may be described as cases where we find a law of a strictly positive and imperative character, which must on that account be applied without regard to consequences ; and Savigny, with a nicer distinction, adds to these the cases in which we are concerned with the legal rules of a foreign State, the existence of which is not even recognised in the State of the judge before whom the case in question depends.

But it is not quite obvious to what laws this character is to be attributed. Savigny ranks in the first class all those laws which have their end and object beyond the province of pure law apprehended in its abstract existence, so that they are enacted not merely for the sake of the persons who are the possessors of these rights. But, as we have seen already, all laws are at bottom enacted for the sake of persons, and therefore the principle of distinction laid down by Savigny

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the law applicable to the facts of the case as administered abroad, or in any part of Her Majesty's dominions, other than that where the court is situated (be it observed that this lays upon the judge the duty of invoking the foreign law), the court may direct a case to be prepared and laid before one of the supreme courts in the other part of the queen's dominions, or in the foreign country whose law is to be ascertained, in order that they may give an opinion upon it. The court is to apply the opinion of any other court in the queen's dominions when obtained, but in the case of a foreign court may re-remit the case for further consideration, or may make a fresh remit to any other superior court of the same country before proceeding to apply it ; the explanation of the difference is, that power is given to consulted courts within Her Majesty's dominions to take for themselves, before returning their opinion, such further procedure as they may think fit. No such power can, of course, be conferred by the British statute upon foreign courts.]

<sup>1</sup> Savigny, § 349, Guthrie, p. 76 *et seq.*; Thöl, Introduction, § 74.

is very indefinite ; and this is fully demonstrated if, with Savigny, we do not merely reckon as belonging to this class the laws that rest upon moral considerations, but take in those also which rest upon public utility, politics, police, or political economy.<sup>2</sup>

Savigny adduces as examples of the second class, the cases of the existence in a foreign State of the legal rule of slavery, or of civil death, and their non-existence in the land to which the court that is to decide the question belongs.<sup>3</sup> Other authors content themselves by giving examples of the laws that belong to this class, and are of a strictly positive and imperative character.<sup>4</sup>

But the fact is that, where the definition is so wide, and is of so various a meaning as merely to create opportunities for the application of other principles, the difficulty is to find ground for an exception.

All that we can admit is, that the court must never let itself become the instrument of setting up a legal relation which its own law regards as immoral, although foreign laws may regard it as allowable. Every further exception, however, is unjustifiable ; and even a legal relation which we consider immoral, and therefore void, must be recognised by our courts, if it is not to be set up within the territory of our State, or, still more undoubtedly, if its existence is merely the foundation of a link in the chain of legality by which a claim is to be maintained in our courts. The legal rule of slavery must of course be described as immoral by common law ; but if slavery is recognised in another country, and a person in that country acquires property through his slave, that acquisition must be recognised as legal by our courts,

<sup>2</sup> Most laws which are not logical consequences of general principles, may be referred to considerations of this kind, and according to Savigny's theory, there would be little room for the application of foreign law.

<sup>3</sup> Savigny, § 349, Guthrie, pp. 78, 79 ; and Unger, i. p. 163. Thöl's definition (§ 74) of the laws that fall under this category—viz., those which do not yield to the will of the individual, is certainly too broad. The laws as to majority and minority are of that kind, and yet Thöl regards the *lex domicilii* of the parties as valid in questions where these laws are concerned.

<sup>4</sup> Bluntschli, *Deutsch Privatr.*, i. § 12, p. 37 ; Wetter, *Deutsch Privatr.*, § 42 ; Merlin, *Rép. Loi.*, § vi.

if the slave-owner should seek to recover his property in our State.<sup>5</sup>

In countries subject to French law, it is considered indecent to institute an action for aliment against the father of an illegitimate child ; such a suit cannot therefore be raised before the French courts, nor can a plea of compensation, founded on the obligation of a father for aliment, which has arisen in another country, be sustained in France if the plea of compensation is originally taken or happens to emerge in a French process, for then the court would, according to the theory on which it proceeds, be setting up an immoral plea : on the other hand, a defender cannot, even in a French court, advance a plea of *indebitum*, if he has paid aliment in consequence of an illicit connection, upon which, in accordance with foreign laws, judgment must follow, and is required to do so in accordance with foreign law.<sup>6</sup>

The second class of laws placed in this list by Savigny is even wider than the first. Since legal institutions, which may happen to have the same name, but in the method of their application to particular cases vary much in different countries, may therefore be considered as substantially different institutions, it follows that if, for example, in one country the authority of the father gives very extensive powers, in another country very narrow powers, over the child in family, we may then assert that in the latter State the institution of a father's authority is quite different from what it is in the former, and therefore in applying the laws of the one on this subject, no regard need be had to the laws of the other.<sup>7</sup> In this way we may step by step reach the exclusion of every foreign legal proposition. We shall find occasion at a later stage to recur to this question in treating of the legal capacity and status of individuals, and of the law of obligations.

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<sup>5</sup> By such a judgment the court no more sets up a claim pronounced by the legislation of their country to be immoral, than it does by believing in the existence of slave States.

<sup>6</sup> So, too, Story, p. 170, and the judgments cited by him at p. 167.

<sup>7</sup> As happens with Savigny in his discussion of the law of pledge, p. 197.

## Part Third.

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### SUBSTANTIVE PRIVATE LAW.

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#### I. PRIVATE LAW IN GENERAL ; FORMS OF LEGAL TRANSACTIONS ; THE RULE "*Locus regit actum*."<sup>1</sup>

##### § 34.

It is a rule admitted by almost every authority since the times of the Middle Ages, that the form of a legal transaction must be recognised as valid all over the world if it is in harmony with the laws of the place in which it was entered into.<sup>2</sup> But yet there are disputes as to the extension of this rule to all forms, or its restriction to certain specified forms, and also as to whether the observance of the *lex loci actus* is to be exclusive or only permissive.

Just as little unanimity is there as to the grounds on which this rule can be justified. According to some a distinction must be drawn between the laws relating to persons, to things, and to acts, and no other law can be applied to the last class than that which obtains at the place where the transaction is entered into. This is the old statute

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<sup>1</sup> This rule has reference also to the import of the transaction. In this paragraph we have not as yet anything to do with that subject.

<sup>2</sup> Thöl recognises the rule only in a small sphere, § 83, in reference only to those legal transactions which have been entered into with the assistance of public functionaries, or drawn solely by such persons ; and Hauss, pp. 45, 60, limits its operation still more strictly.



theory.<sup>3</sup> According to the theory of others, all persons, in so far as the transactions into which they enter are concerned, are necessarily subject to the authority of the State in whose territory these transactions take place, and the rule in question immediately follows from this consideration.<sup>4</sup> Many derive the rule, not from any forced subjection of the parties to the laws of the country where the transaction takes place, but from a voluntary submission on their part (Autonomy).<sup>5</sup> Finally, there are others who refer the rule to a general customary law.<sup>6 7</sup>

The first ground assigned proves too much, and, therefore, nothing. Since all legal relations are truly determined by acts of some kind, the law of the place in which that act is done must be the only one that can be applied in international law—a position which the adherents of this view do not adopt.

The second rests upon a false assumption, and, if this assumption be conceded, upon an erroneous conclusion, as Wächter has shown.

The assumption that the State desires to subject all acts

<sup>3</sup> Vinnius, *Comm. in Instit.* ii. § 14; Phillips, *D. Privatr.*, i. p. 192; Matthæus, *de auctionibus*, i. 21, No. 38; (v. Grolmann) *Ueber Holographische Testamente*, p. 14.

<sup>4</sup> Glück, *Pandects*, i. p. 291; Ricci, *Sketch of Burghal Laws*, pp. 528, 529; Danz, *Privatr.*, i. § 53; Ziegler, *Dicastice Cond.* 15, § 7; Witzendorf, *de Stat.* xx. No. 8; Kori, iii. p. 4; *Archiv. für die Civ. Praxis*, vol. xxvii. p. 309. Those also are to be reckoned among this class who treat the settlement of the question by the *Lex loci actus* as something natural, e.g. Phillips, i. p. 192.

<sup>5</sup> Mevius in *Jus. Lub.*, qu. 4, § 14; P. Voet, 9, 2, No. 11; Petr. Peck, *de Test. Conjug.*, L. iv. c. 30, No. 1; Colerus, *de Proc. Execut.*, i. c. 3, n. 182; Hauss, in so far as he recognises the rule at all; Pardessus, v. No. 1485; Eichhorn, *D. Privatrecht*, § 37.

<sup>6</sup> Gaill, iii. 123; Mynsinger, *Observ. Cent.*, v. obs. 20, Nos. 4, 5, says, "*Vulgo receptum est*," and certifies that as the practice of the privy-council of the Empire; Kierulf, *Civilr.* p. 81; Hartogh, p. 69; Wächter, ii. p. 368; Mittermaier, i. § 31; Savigny, § 381, Guthrie, p. 319; Gerber, § 32; Beseler, i. p. 155; Schöffner, p. 98; Fœlix, i. p. 164, especially 172; those too, who, like Story, § 261, appeal to the *Comitas gentium*, may be counted here. Cf. also Alef, No. 44; Wheaton, § 90, p. 121; Burge, i. p. 29.

<sup>7</sup> That this rule is not derived from the Roman law, an assumption made in earlier times (e.g., by Pütter, *Rechtsfälle*, iii. pt. i. No. 248), we have already sufficiently shown (cf. p. 13, § 2).

that take place in its territory to its own laws is incorrect ; for it does not follow that it desires to do this in every relation because it has the power to do it ; and, if it did desire it, the question would still remain why this determination should be respected by another State in which the transaction may be put forward for recognition.

But it is just as difficult to acknowledge the soundness of the third ground. The laws which prescribe the forms of legal transactions do not concede anything to the will of the parties. If the law requires a particular form, the parties cannot renounce it and contract without it ; and, in the same way, they cannot agree to contract according to the forms of any foreign country they please.<sup>8</sup>

In fact, no one has as yet succeeded in finding an *à priori* justification of the rule ; and the view which prevails in modern times, and which assumes that it came into existence through a prevailing customary law, is correct. For it is certainly not a self-evident proposition. The form of the legal act is a necessary condition of the act itself, and should therefore be judged by the same law as that to which the act itself must be subjected. (A testament contains a settlement of succession, and so the form of the testament should be in accordance with the law which is to determine the succession.) On the other hand, although Wächter has already demonstrated by numerous illustrations that such a customary law exists, we have no historical analysis of the doctrine. One cannot deny that there are ample reasons of convenience to justify it ; it is often very difficult, and not unfrequently impossible to observe the forms which the law properly applicable to the act demands, when parties are drawing up the legal embodiment of that act in another place.<sup>9</sup> The convenience of the rule, although it may explain its extension, cannot explain its origin, since the rule is at variance both with the law of Rome and the law of personal rights. No doubt there are some passages in the law of Rome which at first sight support it ; and we may believe that there happened here what happened

<sup>8</sup> Wächter, ii. p. 406. "Motive" to art. 999 of the draft of a Commercial Code for Wurtemberg.

<sup>9</sup> Savigny, § 381, Guthrie, p. 318 ; Gerber, § 32 *ad fin.*

with so many other passages which were employed in the middle ages and later to establish quite arbitrarily rules of law that have a very recent origin. However, in the present case we have not to deal with a rule of Germanic law, which required to be strengthened and saved from destruction by an appeal to the law of Rome ; this new rule was rather in plain contradiction to earlier legal theories, for according to them the forms of legal acts were determined by the personal law of the contracting parties, and that so absolutely that if these parties were subject to different personal laws, the forms of both had to be observed.<sup>10</sup> It is therefore highly improbable that this rule was in this way read into the Roman law, as no doubt did happen in other cases.

It is often laid down, that this proposition of law took its origin in the sixteenth century, or not much earlier. In reality, however, it is considerably older. As early as the days of Cinus of Pistorium, for instance, it is spoken of as *communis opinio*<sup>11</sup> that the *lex loci contractus* is to determine the *litis decisoria* (in contradistinction to the *litis ordinatoria*, i.e., the rules for the form and course of procedure); that author hesitates only in the case of the form of a testament, and remarks that opinions are divided on that question, some being inclined to respect the law that prevails at the place where it was drawn up, some the law of the place where the thing conveyed is situated. The same deliverances may be found in Albericus de Rosate (De Stat., p. II., qu. 8) Petr. de Bellapertica,<sup>12</sup> Paulus de Castr.,<sup>13</sup> Ralph Fulgosius,<sup>14</sup> and Petr. de Ravenna.<sup>15 16</sup>

It is a fundamental principle of all these older writers, as we have already noticed, that a *Statutum* binds none but subjects, and accordingly the legal transactions concluded by

<sup>10</sup> Cf. *supra*, § 3, note 5.

<sup>11</sup> Ad Leg. 1, C. de S. Trin.

<sup>12</sup> Ad Leg. 1, C. de S. Trin.

<sup>13</sup> Ad Leg. 1, C. de S. Trin., No. 11.

<sup>14</sup> Ad Leg. 1, C. de S. Trin., No. 21, 18.

<sup>15</sup> Sect. 4, § 75 in the Tractatus Ill. ; J. Ct. de stat., fol. 388, p. 2.

<sup>16</sup> Durandus, too, Spec. Jur. L. II., p. 2, *de testamentorum edit*, § 12, No. 16, discusses the forms of testaments. Bartholus de Salic in L. 1, C. de S. Trin., No. 12 ; Bald Ubald ad L. 2, C. de S. Trin., No. 83 ; Bartholus ad L. 1, C. de S. Trin., No. 14, proposes that the *lex loci contractus* should alone determine the *sollennitates actus*.

foreigners in this country are not in themselves subject to the laws of this country. But they looked upon the rule "*locus regit actum*" as an exception, and for the most part justified it by the remark that the *sollennitates actus* belong to *jurisdictio voluntaria*, and by a generally recognised axiom that the transactions attested before one court must be held by all other courts as well attested. (Cf. Cinus de Pist., Petr. de Ravenna, Bald de Ubald, Durand.) Nothing, therefore, is more likely than that the rule *locus regit actum* arose in this way. No other form of concluding legal transactions was in use in the Middle Ages than a judicial completion of them;<sup>17</sup> where private documents are found, the form of the transaction is not determined by the document; all that is thereby effected is the preservation of proof of the transaction. These lawyers had no occasion, therefore, in discussing this rule to take any notice of private documents.<sup>18</sup>

Now, as far as regards the conclusion of contracts before a court, it is plain that the object of this form, by which a legal transaction was either concluded in open court, or by being recorded in the books of the court was made known to all, was either to give in the particular case a special attestation to the transaction which was held to be necessary, or at the same time to give it a special publicity. This end, which the prescribed judicial forms had in view, taken along with the theory that prevailed in the Middle Ages, that the emperor was the true superior of all Christendom, and all judges derived their jurisdiction, at least indirectly, from him, necessarily caused the attestation of a legal transaction before any judge in Christendom to be recognised as valid by any other tribunal. An appeal might also be made to the well-known axiom of Roman law: "*Acta facta coram uno iudice fidem faciunt*"

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<sup>17</sup> It is not meant that the course of procedure to be followed by the Courts of different countries was determined by the same forms; the inference that is drawn rather assumes a variety of forms.

<sup>18</sup> Briegleb Ueber execut Urkunde, pt. I., p. 30. "The use of private instruments was in the lowest credit, and in consequence a notarial instrument was attached to every transaction that was of the slightest importance."

According to Baumeister (Hamburgisches Privatr., I., § 10, p. 64) private instruments were first used as articles of evidence in Hamburg at the end of the fifteenth century.

*apud alium.*" It was, however, natural that every judge should, in attesting any such transaction, proceed according to the laws and rules of process recognised in his own country, and if there had been any attempt to recognise the variety of particular usages and customs, the benefit of these public instruments would have been very much restricted, so endlessly various, at least in detail, were the forms of judicial procedure.

To these considerations we may add this fact. The forms which were used in the judicial completion of a contract were, as a rule, formed upon the model of the forms of process; a striking example of these is the introduction of the *instrumenta guarentigiata*, by which the creditor was empowered to recover his debt forthwith from the debtor who was by anticipation formally adjudged to be due the debt, by means of a *parata executio* (Briegleb I. p. 67). Now, no one has ever doubted that the forms of a suit must be determined by the laws of the place where the court is situated. Nothing was more natural than to extend this rule to processes where voluntary jurisdiction was conferred, if these processes were conducted according to the forms of litigious jurisdiction.<sup>19</sup>

What was true for judicial transactions would easily be extended to deeds or transactions before witnesses in the confused state of legal conceptions in the middle ages.<sup>20</sup> The tribunal here really consisted of a number of credible persons who were members of the community and could bear testimony to all that passed, while the presiding judge had no duty save to attend to the formal execution of the instrument.

This explanation is confirmed by the exception, which all writers of the middle ages make, that in conferring real rights

<sup>19</sup> Cf. the discussion in Cinus de Pistorio in L. un C. de confessis; Bartolus de Saxoferr in L. 15 D. de re judicata 42, 1, § 1, No. 8.

<sup>20</sup> Savigny gives an instance, History of Roman Law, I., § 27, p. 128. As a general rule, however, the imperfect organisation of the machinery of States in the Middle Ages makes the distinction between witnesses and an official a very doubtful one. If, for instance, it is provided by statute that transactions of a particular kind shall take place before two members of council, who may be chosen at will by the parties, are these persons witnesses, or do they constitute an official board?

to heritable property the laws of the place where the property is situated alone decide.<sup>21</sup>

Considerations of expediency, which we can certainly adduce for this exception, could not very easily have produced a *communis opinio* on this point. But in accordance with the theory of development which we have assumed, the matter is very simply explained by the fact that in the Middle Ages, in litigious suits and processes of voluntary jurisdiction about real property, the tribunal of the place where the thing was, was alone competent, and therefore the forms in use before another court could never become subjects of inquiry. We shall see that where the heir was held to be an universal successor, and in that character to represent the person of his predecessor in all questions of property, and where, therefore, the right of succession did not substantially depend upon the nature of the particular assets of the estate, the forms of testaments were subject to the general rule "*locus regit actum*;" but where, on the contrary, the law of succession did no more than supply a particular means of acquiring articles that belonged to the dead man, the forms of testaments were determined by the *lex rei sitae*.

The acquisition of real rights in movables and the loss of these necessarily constitute, as we shall hereafter see, a second exception. That these are but seldom mentioned by authors of the Middle Ages and of a later date is, however, explained by the fact that, on the one hand, in the Middle Ages there were many actual and legal obstacles<sup>22</sup> in the way of following out by process real rights to particular pieces of movable property, and such questions therefore were not likely to be brought before foreign courts; on the other hand, there were not many instances of forms to hamper the transference of real rights to movables. In the single case that is pertinent in this connection, if the heir is not held to be an universal successor, and where therefore we may consider what right can be acquired by testament in the movable assets of a succession, the fiction, which all writers of the Middle Ages who have discussed the conflict of statutes of succession have

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<sup>21</sup> Cf. *infra*, the discussion of real rights, § 61.

<sup>22</sup> We may remember the axiom: "Hand must guard hand."

adopted, comes into play—viz., that moveables follow the person, and therefore are held to be present on the spot where the testator declares his last will, at the moment when he draws up his testament.<sup>23</sup>

### § 35.

The expressions used by the oldest authors on this subject make it quite plain that they do not confine the rule to the form of judicial or even notarial instruments. Any such limitation, in view of the impossibility of distinguishing between the character of a witness and that of an official person, would in reality have been inconsistent.<sup>1</sup> Almost all the authorities lay down the rule in that wider sense, in which it extends to extra-judicial forms, and have no hesitation in affirming a customary law in this sense also.<sup>2</sup>

<sup>23</sup> On this question see *infra*, § 107. *et seq.*

<sup>1</sup> Cf. citations *supra*, and Alb. Brun. *de stat.*, x. § 56; Alb. de Rosate, Sect. ix. qu. 46, § 1 *et seq.*

<sup>2</sup> Cf., besides the former citations, Alexandr. Imol. Cons. L., v. cons. 44, Nos. 20, 21; Jason Mayn, Cons., vol. III. cons. 59, Nos. 1-3; Christian Decis., vol. I., dec. 283, No. 1, decis. 200, Nos. 35-7; Huber, § 15; Hert, iv. § 10; Rodenburg, iii. p. 2, c. 2, §§ 5-7; J. Voet, *de stat.*, § 13; Burgundus, iv. 7; Christianæus, in leg. municip. Mechl., tit. 17. art. 1, No. 11; Everhardus, Cons., vol. II., cons. 28, No. 80; Hartogh, p. 1 *et seq.*, Henr. de Cocceii, viii. § 7; Hofæker, *de efficacia*, § 28; Ant. Matthæus *de auctionibus*, i. 21, No. 38; Molinæus, in L. 1, C. de S. Trin., p. 6; Alderan Mascardus, Concl. 6, No. 22; Dassel *ad Consuetudines Luneburgenses*, c. 8, No. 7; Seuffert, *Commentar.*, i. p. 247; Wening-Jugenheim, § 22; Günther in Weiske's *Rechtslex*, iv. p. 737; Reinhardt, *Supplement to Glück's Pandects*, i. 1, pp. 31-2; Mühlenbruch, § 73; Casarejis, *disc. de commercio*, 43, No. 19; Stryck, *de jure principis in territoris alieno*, c. 3, Nos. 18-30; Malblanc, *Princ. Jur. Rom.*, § 66; Cochin *Œuvres*, V. p. 697; Holzschuher, *Civilr.*, i. p. 67; Mittermaier, *D. Privatr.*, § 31. Cf., too, Burge and Story, who speak to the English and American procedure. Unger., *Oesterr Privatr.*, i. p. 205; Code Civil, arts. 47-8 (as to *Actes de l'état civil*), art. 999 (as to the forms of testaments); Klüber, *International Law*, § 55; Allgemeines Preuss. Land Recht, i. 5, § 111: "The form of a contract is to be determined by the law of the place where it was executed." A judgment of the Supreme Court at Berlin, of 3rd April, 1857 (Striethorst, xxiii. 352), remarks that it must not be supposed that the Allgem. Preuss. Land Recht intended to do away with the rule of common law—viz.: "the form of every legal transaction is to be determined by the laws of the place where it is made," because it did not set out an universal rule to the same effect. Cf. judgment of the Supreme

The limitation which some authors impose on this rule by confining it to instruments which are executed before a magistrate in a foreign country (*e.g.*, Thöl), must be rejected as irreconcilable with actual existing usage. It would, besides, do much to lessen the benefits of the rule, which are universally admitted; legal transactions could in that state of matters only be entered into in a foreign country before an official, according to the forms in use there. No doubt it may be objected (Thöl) that the object of many of the laws dealing with the forms of legal instruments is to be explained on grounds of expediency, their intention being to prescribe the form of legal transactions for all natives without making any distinction as to the place where the legal act took place. But this reasoning, if it were universally applicable, would make even the transactions entered into before foreign magistrates invalid, if it should happen that these officials did not make use of the same formalities as ourselves. The forms which our laws require to be observed in the acts of our magistrates, are held to be as essential for the attestation and legality of these acts as those which they prescribe for the validity of private transactions. What is true of one class must apply to the other also. *Quid juris*, if native law does not permit

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Court of Berlin, of 13th June, 1857 (Striethorst, 24, p. 370). Bluntschli, D. Privatr., i. p. 12, iii. 1; Renand., D. Privatr., i. § 42, iii.; Oppenheim, Völkerrecht, p. 402; Treaty between Prussia and Lippe, of 18th March, 1857, art. 32 (Prussian Collection of Statutes, 1857, p. 289); Draft of Civil Code for the Kingdom of Saxony, § 7: "The laws are just as much applicable to the transactions of Saxon subjects in a foreign country, or even of those who are subjects of another State, if we have to consider their operation in this country. But in questions relating merely to the form of a legal transaction, it will be considered to be in order if it is valid by the laws of the place where it was entered upon, unless the co-operation of some Saxon official is essential to its validity;" Hanoverian Statute of 29th October, 1822 (G. S., 1822, i. p. 381), § 3: "Parties may also enter upon legal transactions of purely voluntary jurisdiction" (*i.e.*, by the 1st and 2nd sections of this statute, transactions which do not require any previous *causæ cognitio*, and do not belong to what is called mixed voluntary jurisdiction), "before a foreign court as well as a court of this country, always, of course, provided that they observe the formalities prescribed there." The statutes include in acts of purely voluntary jurisdiction all those that depend solely on the free-will of the parties, and to this class, by special enactment, testaments and other instruments, *mortis causa*, are declared to belong.



some particular legal transaction except before a court, while it is impossible in the foreign country to complete it judicially, because the courts there do not possess the voluntary jurisdiction, which is necessary to enable them to deal with the case in question? In conformity with this reasoning, we should have to deny validity to all transactions entered into before the foreign officials who did not possess the special qualifications which native law requires of the officials who are entitled in this country to give validity to the execution of such transactions.

The observation which is also made on this point (Thöl), to the effect that our rule of law necessarily involves the interpretation, through usage, of an unwieldy mass of legal axioms, every one of which will, as far as its import in international law is concerned, require to be tested and explained, is not to the point, seeing that the rule is founded upon interpretation by usage. Whenever we have to do with a legal axiom, which either expressly or impliedly refuses to be expounded to this effect, then interpretation by usage has nothing to do with it, and cannot have. For instance, if by statute certain contracts are only recognised as valid if they are executed before a judge, qualified either in respect of the persons or of the subjects involved to superintend them, validity is denied to any transaction concluded in any other way,<sup>3</sup> and the like holds if it is prescribed by special enactment that a transaction shall only be valid under certain forms prescribed by native law, and the transaction is concluded abroad under other forms. Legislators have had no difficulty in recognising the rule to the extent we demand in comprehensive enactments pervading entire codes and treaties, and applicable to future as well as to existing laws.<sup>4</sup>

According to another view, the rule is to be recognised in so far as it deals with forms which exist *probationis causa*

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<sup>3</sup> Cf. note 2, Law of Hanover of 29th October 1822 (§ 1-3), whereby transactions to which are limited, by reason either of the persons or of the subjects concerned, to some particular court, cannot be entered upon before foreign courts.

<sup>4</sup> See Fœlix, i. p. 176, and again as to the numerous statutory provisions, p. 186 *et seq.*

only.<sup>5</sup> We must, however, reject this limitation also. Of course, if it is provided by statute that a particular transaction can only be entered upon in a particular form, such a transaction in any other form than that so prescribed cannot be received in evidence; but this provision, besides providing means of proof, necessarily protects the parties from hastily concluding their transaction, bound up as it is with circumstantial and striking solemnities. Otherwise we should have to conclude that if the consent of the parties to the conclusion of any contract were proved by some means other than those provided by the statute in as clear a fashion as the statutory means could attain, the contract must be recognised as binding. But every statute which prescribes the forms of a legal transaction has some end beyond that of insuring means of proof; the limitation proposed to be put upon the rule will therefore disappear of itself.

Further, there seems to be no appositeness in distinguishing between the intrinsic and extrinsic form of a legal transaction.<sup>6</sup> The form of such a transaction consists in that which the contracting parties must do in order to give expression to their will in the way required by law, and in nothing else: from this definition of form, as that in which the pleasure of the contracting parties must find its expression, the consent of any third party being entirely foreign to it, it follows that any essentials of such a transaction, the observance of which is not dependent on the will of the contracting parties, cannot be dealt with as forms. When the consent of a third party is required by law, that is to be considered as much part of the matter of the contract as the consent of the original contracting parties. There is an apparent exception in the case where, by law, the consent of a third person cannot be refused, but in such a case that person has no free will, and his consent serves merely to facilitate proof, and to guard the contracting parties from hasty procedure.

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<sup>5</sup> Gand, No. 350-358, Bonhier, cap. 28, No. 1. The reasoning on which he proceeds is peculiar. He thinks that, as the notary or judicial person who executes the instrument is personally bound to observe the forms prescribed by his own law, that form constitutes a personal statute which must be recognised everywhere. See Boullenois, i. p. 497-498.

<sup>6</sup> So Merlin Répertoire, Loi, § 6th, No. 7. Boullenois, i. 446. Fœlix, i. p. 161. Massé, ii. p. 121-126.

But if, on the other hand, we were to understand, like some authors, the forms of legal transactions or acts to mean all that a legal act requires in order to give it force and validity, then, since all questions of law arise from some legal transaction, the whole system of law would require to be treated of under the title of the form of legal transactions, as, for instance, may be seen in Fœlix's work (p. 162). But it is impossible to apply the rule "*Locus regit actum*" to the forms or solemnities of legal transactions in that wider sense; the course adopted is to limit the forms to which this rule is to apply to that class that serve to prove the will of the parties. But, since every form serves this purpose, this limitation is either unimportant, or, if it is thought to indicate those which do nothing more than serve for proof, misleading. As forms in this sense do not, strictly speaking, exist at all, arbitrary and unjustifiable exceptions to our rule will be made.

For instance, by common law the provisions of the *Senatus Consultum Velleianum* are merely provisions to limit the form of undertaking suretyship in the case of a woman, since it needed, in order to make the surety valid, that the woman should previously have been informed as to its meaning by a lawyer, or should ratify it by the form of an oath. But no one can say that these provisions exist merely as means of proof, for by them the female sex is protected against hasty acts. Our opponents then go on to pronounce these to be no mere external forms of legal transactions, and hold, therefore, that the rule "*Locus regit actum*" is not applicable.<sup>7</sup> But the same thing may be said of all forms—*e.g.*, of the necessity of writing.

The restriction, too, which many authors adopt, to the effect

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<sup>7</sup> The decision of the Royal Court of Paris of 15th March, 1831, which is assailed by Fœlix, i. p. 219-20, explains itself on this ground, if not on the grounds assigned by the court. The question was as to a surety undertaken by a Spanish woman in France, and it was disputed by the woman on the ground of the provisions of the Roman law still valid in Spain. The Court held that, as the real property pledged by the guarantor was situated in France, the capacity of the woman to pledge it must be determined by French law, and generally, that contracts concluded in France, which were sought to be enforced in France, must be interpreted by French law. An appeal was dismissed without a decision on the real question of law, on the ground that the judge had not gone against any law of the land.

that a legal transaction, valid by the *lex loci contractus*, is not to be recognised if it has been entered into in a foreign country *in fraudem legis domesticæ*—i.e., in order to withdraw it from the operation of some law that prevails in the native country of the parties,—is, as Wächter has shown, ii. p. 413, without foundation.<sup>8</sup> It is lawful to enter into legal transactions in a foreign country under the forms that are valid there, and it is impossible that any fraud can be found in the case of this legalised privilege. An act is held to be *in fraudem legis* only if the rule of law is incorrectly expounded, or the state of facts to which it is to be applied is suppressed or misrepresented. Neither can be asserted of the case we have put.<sup>9</sup>

Still less can anything depend upon whether it was possible for the parties to observe any other law than that which prevailed at the place where the transaction was entered into: such a limitation is quite arbitrary and unpractical, and is at variance with that which must be recognised as the prevailing theory.<sup>10</sup>

### § 36.

Although we must cast aside these arbitrary limitations of the rule, we must not lay it down that legal transactions can only be recognised as valid if the *Lex loci actus* is observed, in so far as their form is concerned. If we assume, as we have done, that the rule takes its rise in customary law, it must be held to be for the assistance of the contracting

<sup>8</sup> P. Voet, cap. 2, § 9, No. 9. Weber, *Naturl. Verbindlichkeit*, § 62. Thibaut, § 38. Mühlenbruch, § 63.

<sup>9</sup> Thöl, § 65. On the other hand, one does not evade a rule of law by excluding the possibility of its application, and avoiding the act for which it makes a regulation. The same end can often be reached by different ways, the one of which causes more, the other less expense, trouble, delay, and other disadvantages. If we for that reason avoid the one and follow the other, we do not evade the application of a rule of law, but make it impossible to apply it.

<sup>10</sup> See to the contrary, Wächter, ii. p. 416. Hauss makes some important remarks, which are to some extent contradictory, p. 45 and p. 60. On the other side, Fœlix, i. p. 173. Kieler Juristenfacultät bei Brinckmann, *Wissenschaftlich Rechtskunde*, i. p. 10. Judgment of the Supreme Court at Stuttgart, July 1, 1852 (Seuffert 6, p. 1.) Judgments of Supreme Court of Appeal at Lübeck, 14th and 30th September, 1850 (Römer. 2, p. 410-422).

parties that it exists, and not as a compulsory form. These parties, therefore, have it in their power either to observe the form which is recognised in the country where the transaction takes place, or that which is provided by the laws to which the transaction is subject.<sup>1</sup>

In this connection it is well to remember that, in the case of mutual contracts, there would actually need to be a consideration of the laws of the domiciles of both parties if the *lex loci contractus* were not to rule. This we have hitherto assumed as self-evident, and later, in the subject of the law of obligations, we shall recur to it. If these laws in a case of the kind were different, and both parties had not observed the forms required by both, then the contract, unless it is voluntarily fulfilled, is simply null, unless the provisions of the law of the place of execution are to be respected. No preference can be given to either system of law, since all arguments are as much in favour of the one as of the other.<sup>2</sup> Mutual contracts, therefore, if they are not in conformity with the forms of the *lex loci contractus*, can only be recognised as valid if they are in conformity with the forms which are recognised at the domicile of both of the contracting parties.

It must at the same time be remarked that the observance of the forms prescribed for any contract constitutes the best proof of the expression of will to enter upon it. If, therefore, the forms prescribed by the law of the place of the contract are not followed, it will often be doubtful whether the negotiations of parties are or are not to be considered as mere preliminaries. The will of the parties to undertake the contract must be demonstrated by some other special proof.

Even if the forms which are required by the native laws of both contracting parties happen to be observed, this doubt must be still removed; and as a general rule it cannot be

<sup>1</sup> Rodenburg, Tit. 2, l. 3, §§ 2, 3; Fœlix, i. p. 180; Wächter, ii. p. 377-380; Savigny, § 382, Guthrie, p. 325. Cf. sketch of Code for Saxony, § 7, and Hanoverian Law of 29th October, 1822, § 1-3 (*supra* § 35, note 2 *ad fin.*). [Cf. *infra*, p. 144.]

<sup>2</sup> The rule, "*Commodissimum est id accipi, quo res de qua agitur magis valeat*," relates to the interpretation of the meaning, and not to the form of the transaction; and it is with the form alone that we are at present concerned. The forms of contracts are entirely beyond the control of the parties.

dispelled if the native laws of the contracting parties prescribe no particular form for the transaction in question. The validity of such a contract will seldom fall to be affirmed, except when subjects of the same State make a contract in a foreign country, or some one in a foreign country executes a unilateral deed, such as a testament. But in the former case a transaction in a form which is valid by the laws of the parties' native country cannot, as a matter of course, be treated as binding. There is, as a general rule, a want of proof of the will to enter upon a binding engagement if the parties do not know each other to be fellow-countrymen, or if the transaction is one which has no reference to the domicile of the contracting parties, or has no connection with the personal intimacy of the parties (*e.g.*, if the contract, according to the meaning of parties, is to be carried out on the spot, or if it is concluded on the exchange or in the market, and falls under the laws that prevail there, on the ground that, where there is so much common intercourse, it is only reasonable that one common law should bind all who resort to it).

It is different if the contract is really meant to be carried out in another country ; or if there is some consideration of personal intimacy to be taken into account, as is the case in the contract of marriage, to be dealt with hereafter.

In the case of unilateral acts these doubts do not occur so frequently, and are to be treated as settled if the particular forms prescribed by the native laws of the party executing them are observed. The will to execute a valid act is in this case proved by the observance of the forms. Since the laws of nearly every country prescribe particular forms for last wills, it is most natural that instances of the application of the laws of the domicile should be presented in this connection ; and it is this question which is chiefly dealt with by authors on the subject, while they do not concern themselves with what is, as a matter of fact, not a very frequent occurrence—*viz.*, the neglect of the *lex loci actus* in the case of bi-lateral contracts. We have no right, therefore, to hold those persons who apparently take no heed of anything but the *lex loci contractus* to be opponents of our theory, unless they expressly reject the validity of the *lex domicilii*

in every case such as we have put. We may, indeed, safely assume that they agree with our theory, if they propose to recognise the validity of a testament executed in a foreign country in cases in which it is in conformity with no other law than that of the domicile of the testator.<sup>3</sup>

But just as we require extraneous proof of the will of parties to enter upon a legal act according to the laws that prevail in their domicile, that will may be left doubtful even in cases where the form is according to the *lex loci actus*, especially in cases of unilateral acts, if it should happen that such acts require fewer forms according to the rules of law in force on the spot where they are executed than they do according to the laws of the domicile of the person who executes them ;<sup>4</sup> and the same doubt may

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<sup>3</sup> Hert, iv. 23, 25 ; Rodenburg, ii. c. 3, §§ 1, 2 ; Hofacker, De Effic., § 28 ; Seger, p. 24 ; Ziegler, Concl. 15, § 16 ; Witzendorff, xxvii., No. 7 ; Dionysius Gothofredus, Ad Leg., 20, D. de Juris Dict., 2, 1 : Bouhier, cap. 28, No. 20 ; Vattel, ii. c. viii., § 111 ; Mittermaier, D. Privatr., § 32, p. 121 ; Gand, No. 579 ; Burge iv. p. 588. Boullenois is quite illogical (i. p. 422, and ii. p. 15) in allowing the *lex loci actus* alone to rule, while he still gives inhabitants of provinces where holograph wills are recognised, the privilege of availing themselves of this simple form in a foreign country. Cf. with this reasoning, in which the form of a holograph will is treated as a personal privilege, with the judgment of the Appeal Court at Paris, reported by Sirey, v. 1, p. 357. Some of the authorities quoted above limit the validity of a testament which has been executed according to the laws of the testator's domicile, but is not in conformity with the form of the *lex loci actus*, to the property which is situated at that domicile ; but under the rule, "*Mobilia ossibus inhaerent*," they include in this all moveable property. We shall discuss this question hereafter in connection with the law of succession. It is only by a very few authors that we find it expressly remarked—a remark for which they give no justification—that a testament, valid according to the laws of the testator's domicile in its form, is null if it does not in form answer to the requirements of the laws of the place where it is executed (Riccius, p. 533 ; Holzschuher, i. p. 81. Cf. also the citations given by Fœlix, i. p. 162-4). The kernel of this theory lies in the erroneous assumption that the law desires to apply its authority to all and every act that takes place in its territory—a notion we have already combated. Cf., too, the judgment of the Court of Appeal at Paris of 9th March, 1853, reported by Demangeat in his note to Fœlix, i. p. 184.

<sup>4</sup> Cf. Mittermaier's note, § 31.

In this sense the form of a legal act has reference to the will of the contracting parties,—not, however, meaning thereby that we should test in this way the validity of the form, but merely determine its import upon the binding force of

arise in the case of bilateral contracts, if, for instance, the contract is made while the parties are travelling by rail or mail-coach.<sup>5</sup> In the latter case there may even be some doubt as to where the contract was concluded. For there is nothing at all to show, if different laws prevail at the different stages of the journey, which of them is to prevail as the *lex loci contractus*, and if we were to adopt the theory which makes the *lex loci contractus* the sole rule as to the form of every legal act, we should have no principle of determination to guide us. But, according to the view we have maintained, the act is valid if in its form it accords with the laws of the domiciles of both contracting parties.<sup>6</sup>

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the act. Perhaps it is from this fact, which is undoubtedly entitled to much respect, that the theory by which the rule "*Locus regit actum*" is founded upon a voluntary submission to foreign law (autonomy) has sprung.

<sup>5</sup> The judgment of the Supreme Court of Appeal at Jena in 1832 goes too far in restricting the rule "*Locus regit actum*." It remarks:—"As a rule subjects are answerable only to the law of their native country, *i.e.*, of their domicile. The exception '*Locus regit actum*,' implies that the obligations undertaken by them in a foreign country are to receive effect in their native country; for it is only in this case that the foreign territory has any legal interest for the contracting parties. Without such an implication it seems to be pure chance whether these subjects have concluded their contracts on their own or on native soil, and chance can never avail to deprive their native laws of their jurisdiction. But if any act has to be carried out, or may come before the Courts of the foreign country where it is executed, there can then be no question whether the parties desired to bind themselves by the laws of that place or not, nor can there be any question as to whether they knew these laws or not, since ignorance of the law is an excuse that will not avail even in the case of temporary subjects" (Seuffert, 2, p. 162). On the other hand, see a judgment of the Supreme Court at Berlin of 3rd April 1856 (Striethörs, 30, p. 303).

<sup>6</sup> Acts of public officers, however, are only valid if the forms prescribed for the place of their execution are respected. This case does not fall under the rule "*Locus regit actum*." The Government can only give a public authentication to the acts of its officers on condition that all prescribed forms are respected. The neglect of these forms leads to the result that the defective acts are not recognised as of official weight, and they cannot acquire a public authentication from the accidental circumstance that in another country these forms are not necessary. If, for instance, the laws of the place where any deed was executed required the register to be subscribed by the parties on pain of nullity, or the official to add the official seal to his signature, then if either of these requisites were wanting, it would follow that the deed was void, not only in that country, but could not enjoy public recognition anywhere (Cf. Story, § 260, and espe-



## Note B on §§ 34, 35, 36.

[The doctrine of the text is received in Scotland and France and America, but in England is subjected to serious limitation. In France the doctrine is laid down in a case of *Benton v. Horeau*, 26th August, 1880, by the Court of Cassation. A contract had been concluded verbally in England between a Frenchman and an Englishman; the Englishman came to sue on the contract in France; it was objected that it was incompetent to prove the debt arising on the contract otherwise than by writing, because the amount of it exceeded 150 francs. To this it was answered, that by the law of England, where the contract was made, writing was not necessary to constitute the obligation, and the rule to be applied was *locus regit actum*, this being a question as to the validity of the *vinculum obligationis*. Parole proof was allowed, on the ground that the form of the contract and the proof of the execution must be governed by the law of the place of the execution. The intention of the parties was to bind themselves by the law of the place where they were at the time, and the question they put to themselves was, "Do we need to bind ourselves in writing or not?"

The same principles are applied in Scotland; a contract executed in conformity with foreign forms is recognised as valid in Scotland and enforced there, although it does not comply with Scots forms. In the application of this rule the following liberal extension is made: "This," says Erskine, Instit.

cially the Prussian-Lippian Treaty of 18th March, 1857, Art. 32, "If by the constitution of one either State, the validity of an act depends upon its being undertaken before a particular officer, that is hereby continued"). It is, however, quite consistent with this, that the public officers of a State should, along with the forms therein required to give *publica fides* to any act, observe those forms also, in the case of an act which naturally belongs to another State, which give validity to such an act by the laws of that foreign State, in so far as these foreign laws do not recognise the rule "*Locus regit actum*." Cf. Draft of a Civil Code for Saxony, § 12, Div. 2. "In the case of acts which are to operate solely in a foreign country, public officers, if desired by the parties, must draw these up according to the forms recognised abroad." Hannov. Regulations of 28th Dec. 1821, § 2. "If documents are to be drawn up for foreign transactions, in which, according to the forms of foreign law, a sworn attestation before a notary and witnesses is required, this may be done on the spot." (This regulation forbids generally all oaths before a notary and witnesses.)

iii. 2-39, "holds even in such obligations as bind the granter to convey subjects" (*i.e.* heritage or real property) "within Scotland; for where one becomes bound by a lawful obligation, he cannot cease to be bound by changing places." All personal obligations or contracts "are deemed as effectual, when they come to receive execution in Scotland, as if they had been perfected in the Scottish form." The rule is, of course, limited to forms, "for," says the same author, "it would be absurd to give the smallest effect to a foreign deed perfected according to the law of the place where it was made out which would not be effectual here, though it had been perfected with all the solemnities required by our law." This statement of the law has received judicial sanction in many cases (*e.g.*, in *Purvis' Trustees v. Purvis' Executors*, 23rd March, 1861, 23 D. 831, per Inglis, L.J.C.) "All instruments (without distinction, except in the conveyance of land) executed abroad according to the solemnities of the place of execution, must receive effect in Scotland exactly in the same way as if they were executed within Scotland according to the solemnities of the Act, 1681." This rule has been extended, as in France, in the case quoted above, so as to allow a contract concluded in England, where it might be concluded verbally, to be proved in Scotland to have been so constituted, although writing would have been required to constitute it in Scotland (*Dale v. Dumbarton Glass Company*, 1829, 7 S. 369). The mode of proof, however, must in Scottish Courts be regulated by their own law, *i.e.*, in certain cases by writ or oath, although the question to be so settled may be, "was the obligation verbally constituted?" that being a mode of constitution allowed in the particular circumstances by foreign law, and therefore admitted in Scotland. The logical inference from the rule stated, *viz.*, that the form of a contract is governed by the law of the place of execution, is that a contract which does not satisfy the requirements of that law will not be received by the Court of another country, even although it satisfies the forms of the country in which the Court is situated; this inference has been adopted in Scotland (*Taylor*, 16th July, 1847, 9 D. 1504). An exception is made in cases where the country of the court is the country where it was intended

that the contract should be carried out; the opinion of Lord President Inglis, in *Valery v. Scott*, 4th July, 1876, 3 R. 965, that the observance of either the law of the place of execution or of performance will make a deed effectual, was pronounced in a case where the contract was intended to be carried out in Scotland, although executed in France. The general rule is stated by Prof. Bell, in his "Lectures on Conveyancing," p. 88, chap. iii.: "The privileges allowed to such deeds" (*i.e.*, deeds executed by foreigners according to the law of their domicile) "are extended to writings of the same class, even when the granter is a Scotchman, provided the deeds are actually executed out of Scotland, and according to the laws of the place of execution. But it is essential, as to all such deeds, that as matter of fact they are validly executed according to the laws of the country where they are entered into."

Story states the law in similar terms, § 260 (4): "All formalities, proofs, or authentications of" contracts, "which are required by the *lex loci*, are indispensable to their validity everywhere else." He expresses, however, a doubt as to whether the law of the place of execution, or of the *forum*, will regulate the admissibility of proof of the contract when it comes to be enforced. Probably the distinction on this point taken in Scotland supplies the correct solution.

It will of course be understood that the condition that such contracts or the solemnities required in their execution shall not be inconsistent with our rules of morality or of police, is required by the laws of these countries and by that of England: and in the case of a conveyance of real estate, the *lex rei sitæ* must be observed.

The rule in England is not quite so liberally applied; it is no doubt required there, also, that "a contract *must* be available by the law of the place where it is entered into, or it is void all the world over" (per Lord Ellenborough, in *Clegg v. Levy*, 3 Camp. 167); and Addison states, p. 176, Bk. i. cap. 2, "The *lex loci contractus* generally prevails in all that relates to the legal validity of the contract, the *vinculum obligationis*. . . . If the contract is valid by the law of the country where it is made, it is valid everywhere, unless it is *contra bonos mores*, or is a contract for the

doing of a thing which is directly prohibited and forbidden in, or contrary to, the public policy of the country where the contract is sought to be enforced." But it is also stated by the same writer, p. 179, that a contract must be valid both according to the law of the foreign country and according to the law of England before it can be enforced in England, and Westlake, § 198, sums up the English law thus:—"A contract, although externally perfect according to the law of the place where it was made, cannot be enforced in England unless evidenced in such manner as English law requires." This doctrine is in direct conflict with the systems of law already referred to, and with the doctrine of the text; it seems indeed to be contradictory of the maxim *Locus regit actum*, as Westlake points out. If the intention be to reserve the decision on all matters of procedure, "*litis ordinatoria*" for the *lex fori*, as is indicated from the cases quoted by Addison, that principle is perfectly sound; but the recognition of it need not involve the rejection of a contract as available in England, because it is constituted by other means than those admitted there. The distinction taken in Scotland between the constitution of the obligation and the ascertainment of the fact whether it has been so constituted or not, seems to be the true rule. A prohibitory law allowing no scope to the will of parties will, as stated in the text, demand observance and exclude the rule *locus regit actum*.

The application of the rule to particular legal relations—e.g., marriage, divorce, bills, &c., will receive further consideration *infra*.]

### § 37.

Our theory supplies, too, an answer to the question, by what law a contract, concluded by letters between parties who never meet, is to be determined. We might fancy that the only question could be, whether it should be held as concluded at the domicile of the offerer or the acceptor.<sup>1</sup> But the conflict

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<sup>1</sup> [This is the view expressed by Addison as to English law (Addison on Contracts, p. 178-79): "When contracts are entered into between parties residing in different countries, through the medium of letters, the place where the final assent has been given by one party to an offer made by another, is the place where the contract is considered to have been made." And it is by that

is not determined by the answer to that question, since the laws of the two countries may give different answers. But at the same time, in accordance with what we have already said, we may note that the intention of the correspondents to enter into a binding contract remains doubtful, just because of the defective form. The contract, therefore, is only valid if it is in conformity with the laws of the domiciles of both parties. But, if the person who receives the letter deals only as a mandatory, and in this character concludes a bargain, which, no doubt, binds him by the laws of his domicile, but does not bind the mandant by the law of his domicile, a supplementary obligation may lie upon the mandant created by his mandate, if not by the other contract, if it should happen that the mandatory has *in bonâ fide* believed the mandant to be legally bound, and the mandate did not require any special form according to the law prevailing at the domicile of the mandant.

### § 38.

If an act is invalid because the forms prescribed by the law of the place where it was executed have not been observed, it can make no difference that these forms are required in the interest, it may be, of the public revenue, but at all events not in the interest of the parties. The party who appeals to the invalidity of the act because of a defect in form, has a right by the law of the place of the transaction to hold it null.<sup>1</sup> Neglect of the stamp laws that prevail at the seat of the contract must be visited with the penalty of nullity, if that is the consequence that would have followed on the spot, and it cannot be objected that the fiscal regulations of foreign states have no meaning for

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law that the contract is to be determined. Looking to the universality of the doctrine here enunciated as to the true place of the execution of the contract, this rule will probably satisfy nearly every case that can arise, and the difficulty suggested in the text will hardly ever be experienced.]

<sup>1</sup> One cannot see why, if the rule is that in such cases the law of the place of the transaction is to determine the form, an act void from the first should be validated by the circumstance that it comes to be discussed in the courts of another State (per Chief Justice of Common Pleas, cited by Barge, iii. p. 767).

us.<sup>2</sup> We are concerned with the forms of legal acts, and not with the support of foreign stamp laws. Just as well might the provision of a foreign state, requiring as an essential part of the form of a contract that it should be concluded before a court, be ignored, if this form existed for no other reason but to secure to the state a certain amount of dues upon the execution of such contracts.

*Note C. on § 38.*

[The doctrine of the text is approved by Westlake, p. 231, § 199, and Story, § 260 (4). The latter says: "Thus, if by the laws of a country a contract is void unless it is written on stamped paper, it ought to be held void everywhere; for unless it be good there, it can have no obligation in any other country."

Addison on Contracts, p. 1082, states the law of England to be, that although foreign documents are not excluded from being received as evidence in English courts, because they are unstamped, and therefore could not be received in their own country, yet if they are void by their own law, they cannot be enforced in England. In Scotland the law, until recently, was that the court will not take any notice of foreign revenue laws (Bell's Pr. § 328; Menzies, p. 88; Stewart v. Gelot, 19th July, 1871, 9 M. 1057); but this has been doubted (cf. Lord Deas in Valery v. Scott, 3 R. 965).]

§ 39.

We have still to discuss the question whether an act, which is not valid according to the forms of the place where it is executed, but is valid by the forms of the domicile of the party, is rendered null by a change taking place in the domicile of that party.

This question is identical with the question, whether the act is to be judged by the law of the domicile which the person formerly had, or by that of his last domicile, for the form prescribed by the law of the domicile of a person can

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<sup>2</sup> This objection, for instance, is made by Wheaton, Ph. ii. cap. 2. See the rule stated above in Burge, ii. p. 870; Story, § 260, and an interesting judgment of the Supreme Court of Appeal at Berlin, of 19th May, 1857 (Striethörs, 26, p. 45 *et seq.*)

only have application, if the act is under the control of the law of that domicile.

Accordingly, as we shall hereafter see, obligatory contracts do not become void by an alteration in the domicile of one of the parties. This is, however, certainly the case with testaments; as, for instance, if any person in whose domicile a holograph will is recognised executes one in that form in a foreign country where wills must be executed judicially, and afterwards changes his domicile to the place where these holograph wills are not recognised.<sup>1</sup>

The question seems doubtful as regards contracts dealing with succession. Such contracts determine the line of succession; and if that is to be fixed by the law of the last domicile of the testator, it seems to follow that they, too, must be subject to that law, and so may become invalid,<sup>2</sup> for some defect in form,<sup>3</sup> if they are not executed according to the forms of the place which, by a change in the domicile of one of the parties, is now the place of the contract. But contracts dealing with succession give the contracting parties operative rights at once. A testament first comes into operation at the death of the testator; but a contract of this kind limits his capacity of disposing. Now, this limitation of capacity in favour of the heirs taking under the provisions of the contract, which is already in operation, and is, therefore, under the control of the law of the domicile at that date, can only in these circumstances be rendered inoperative by such legal

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<sup>1</sup> So Wächter, ii. p. 380, with regard to wills. But the meaning which Wächter gives there to the determining consideration is certainly not sharp enough. "If," says Wächter, "the testator's domicile is the only ground for bringing any particular law into play, then, necessarily, as the domicile is changed, so is the law that is to be applied, because with a change in the ground there must also be change in the consequences." From that it would follow that obligatory contracts could become invalid, in point of form, by a change of domicile on the part of one of the contracting parties.

<sup>2</sup> The execution of a legal act, according to the forms of the *lex loci contractus*, ensures, as we have shown, the greatest safety (Unger, p. 210).

<sup>3</sup> The present discussion has nothing to do with anything but defects of form, and the narrower definition of form given above must be kept in view. The failure to institute an heir is, therefore, not regarded as a mere defect in form. The right of the heir-at-law either to be instituted as heir or to be expressly disinherited cannot be held to be a mere essential for the expression of the will of the testator.

rules of the last domicile as forbid the fulfilment of contracts that are already completed. It cannot be attacked under cover of any laws that may exist for the purpose of regulating the constitution of obligations—a category in which all rules as to forms must, of course, be included. The opposite view would allow the parties to such a contract to escape from it by a change of domicile, and give free play to perfidy and fraud.<sup>4</sup>

It is only, therefore, legal acts, which for the present are inoperative, and are capable of change by the will of one party, that can be rendered inoperative altogether by a change in the domicile of the party; bilateral contracts can not. It is obvious again that bilateral contracts, which have once been executed in an informal and, therefore, invalid way, cannot be validated by a subsequent change of domicile on the part of one of the parties. In the case of unilateral contracts, we might easily imagine a tacit continuation of the expression of will that has once been made.<sup>5</sup> The same reasons, however, may be urged against this as prevent the application of new statutes simplifying the forms of unilateral acts to such acts as were invalidly executed in the time of some earlier statutes. Mere ignorance of the law, as Savigny remarks, with reference to the rule *tempus regit actum*,<sup>6</sup> may give rise to neglect of forms, while there is still an earnest desire to enter upon the legal act. But it may also be that the forms have been omitted in the most perfect consciousness of the rules of law applicable to the case, so that the document is only a preparation for the valid act.

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<sup>4</sup> In the foregoing discussion it is assumed that the law of succession is to be determined by the law of the last domicile of the deceased, as is the case according to the principles of the common law recognised in Germany. If, as in English law, the *lex rei sitæ* decides as to real property, then, in so far as they are concerned, contracts as to succession and wills generally can only be validly executed in the form of the *lex rei sitæ*. See below, § 109.

<sup>5</sup> This is, for instance, assumed in the draft code for Saxony, in which, in § 10, div. 2, it is noted with respect to those foreigners who take up their abode in Saxony: "Previous declarations of will, which they can alter at pleasure, are valid, in so far as their mere form is concerned, if they are good either according to Saxon law, or the law of the place where the declaration was made."

<sup>6</sup> System, viii. § 388; Guthrie, pp. 355, 356, 357.



In this way we might be involved in the consideration of circumstances that were accidental and barely possible.

## II.—THE LAW OF PERSONS.

### A. THE NATURAL EXISTENCE OF PERSONALITY— PRESUMPTION OF DEATH.

#### § 40.

The question, under what law the beginning of a person's physical existence falls, has very seldom been considered by courts of law, because, as a rule, the question is merely one of fact. And yet, here too we may imagine cases admitting of dispute—as, for instance, when one law does not hold a child to be living unless it is also viable; while another is contented if the child shall have shown a sign of life for a single moment. The object of statutory provisions of this kind—as to the precise point at which a new-born child can be held to be alive, since we can have no concern with the acts or contracts of such children—can only be to regulate succession, or, by the criminal law to give a child more protection than a foetus. These facts are determined by the law that settles the succession of the child to its predecessor, or, if the case in question be a case of a criminal attempt upon the life of a child, by the criminal law which would have to be brought into action against the same criminal for any other wrong done by him or her in the same place.

It is a more practical inquiry by what law we are to regulate the fictitious destruction of a man's personality by a judicial declaration of death which occurs in particular cases, where there is a complete uncertainty as to whether a person who has been lost to sight is still in life or not. There can be no occasion to inquire into any acts of such a person, or any crime done against him since he disappeared; and such declarations of death can, therefore, have no other object than to settle the rights of inheritance, and the family relations between the person who has disappeared and his connections: the rights of inheritance in a double sense—first, in so far as claims may be made against the estate of the person who has disappeared; secondly, in so far as he may himself

have a claim against another person's estate.<sup>1</sup> As far as family relations are considered, the law which is applied to these for other purposes rules here also. As regards questions of succession, however, cases of the first class are ruled by the law of succession that governs the estate of the missing person; cases of the second class by the law that regulates the succession of the person against whom a claim is made.<sup>2</sup> The following limitation must not, however, be overlooked. The declaration of death does nothing more than raise to legal certainty a likelihood which, as matter of fact, already exists. The object of all the preliminary regulations (*e.g.*, the citation of the missing person by official proclamations) is to give substantial ground for this suspicion; but the operation of these forms must necessarily be confined to a particular part of the globe. They cannot give any satisfactory assurance of the death of the missing man in a remote country, unless some special provision shall be made to set them in operation there—as, for example, by inserting the citation in the official proclamations of that country. Without an assurance of this kind, a judge would fail in his duty who, in place of appointing a *curator absentis*, gave decree for the transference of the estate of the missing man to the heirs. In such a case, the probability of the death must be made out in some way to the satisfaction of the judge; and this will be best done by a public proclamation in the same terms as are used in that foreign country in similar cases. Such a proclamation is not to be held as a proclamation in view of a process of declarator of death; and therefore its operation is not to be tested by the laws of that country, but by those of the country in which the succession

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<sup>1</sup> According to the common law of Germany, the declaration of death applies to the first case only. See Gerber, § 34 *ad fin.*; Beseler, i. § 58, note 17; and the authors there quoted.

<sup>2</sup> Accordingly, if, as is the case by the common law of Germany and of France, the law of the country that is to rule makes the right of succession an universal succession, the law which is recognised at the last known domicile of the person prevails. The definition of domicile understood here, and everywhere in this work, is that given on pp. 90, 91; so that the mere domicile of fact, in the Roman sense, does not rule in relation to the legal systems of different independent States.

to the estate takes place, and the relations of the family are settled.<sup>3</sup>

It is easy to determine the competency of the courts. The law which settles the material results of the declaration of death, decides also what court shall pronounce it.<sup>4</sup>

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<sup>3</sup> If, on the other hand, the missing man was possessed of real property in the other state, and the law of that state does not recognise the right of the heir as an universal successor, then there must be a special declaration of death, with its special results.

<sup>4</sup> We shall discuss the various presumptions that are recognised as to the period of death of different persons lower down in treating of Proof. Burge, iv. p. 152, regards the regulations as to disappearance, and the presumptions thereanent, as mere rules of proof, which the judge must in each case determine by his own law. But, as regards the declaration of death, this view leaves it undetermined, whether the judge can only then hold death to be proved if it has been so proved according to the law of his own country, or whether, and under what conditions, he may allow himself to be convinced by a declaration of death made by foreign courts and according to foreign laws; and this declaration of death is something more than a mere rule of proof, if its object is, as it is according to the common law of Rome, to determine the right of succession and the family relations.

Heffter (§ 37, p. 70, note 3) is of opinion that no judicial declaration of death can take the place of actual proof of death for other countries who have no rule of the kind, or proceed in some other way, since what is merely a legal fiction cannot be binding upon another State which knows no such fiction. But we shall show presently (cf. *e.g.*, §§ 102-123) that many legal fictions are, under certain circumstances, recognised by foreign States; and Heffter admits, on the one side, that he has no foundation for his proposition, while he allows also that legal relations which have already been entered into in a foreign country upon the basis of this fiction, cannot be denied as existing. But by this admission Heffter's whole position is rendered problematical, for what system of legislation is to decide whether a legal relation has already been entered upon? Heffter, for example, concedes (p. 71, note 1) that a succession already entered upon must be recognised in a foreign country, although there has been a mere declaration of death. But, *quid juris*, according to Heffter's theory (cf., too, Fœlix, ii. p. 116, and the legal decisions reported there), if one who has acquired such a succession demands possession of the estate upon the ground of this declaration from a person living in another country, or desires to bring action against debtors to the estate living in a foreign country? Gand (No. 407) comes to be of opinion that a confirmation to the goods of a missing person cannot be obtained in France upon the ground of a declaration of death pronounced in some other country, because foreign judgments are not capable of being executed in France. But the subject under discussion is not a judgment in a real process, but a regulation as to property and family conducted under the control of a judge. One often finds in French authors this confusion between real judgments in litigated actions and acts of voluntary jurisdiction which have some similarity.

## B. CORPORATIONS (LEGAL PERSONS).

## § 41.

The natural persons belonging to a State are recognised as persons in every other State. This undoubted rule is a consequence of the equality of natives and foreigners admitted by modern international law. But by custom it is just as fully recognised that legal persons belonging to another State must also be so regarded. As regards burghs, parishes, and churches this is obvious, but it is just as true of other legal persons. For although the authority of the foreign State by which legal personalities are either directly created, or their creation by private persons tolerated, has no weight in one State for itself, yet modern international intercourse requires the same recognition to be extended even to the legal personalities which may be capriciously created.<sup>1</sup> For instance, without such recognition companies constituted by shares could have no international dealings. It is no doubt conceivable that we might escape from the difficulty by requiring all such institutions to obtain special State recognition from the proper authority in every State in which they might happen to deal or sue. But it might often be that the different States would impose contradictory conditions. The legal personality would, besides, have to be recognised by the Governments of almost all civilized States, so that the extended enterprises of trade might go on smoothly. That would lead to inexpressible difficulties and uncertainties. The only exception we recognise is when the foreign association pursues some object which is forbidden by our laws.<sup>2</sup>

Conversely, an association which has no validity in its own country, cannot claim the rights of legal personality in another State. Legal personality, so far as private law is concerned, has no other end than to make it permanently

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<sup>1</sup> Judgment of the Supreme Court at Berlin, 8th Oct. 1849 (Decns., 20, p. 326). The recognition of legal persons requires, of course, that the laws that prevail at the seat of the same as to the constitution and minor arrangements of the company shall rule. (To this effect the grounds of the judgment cited above.)

<sup>2</sup> Günther, p. 279 ; Fœlix, p. 65 ; Cf., too, Wächter, ii. p. 181-2.

possible to divide, according to certain conditions previously laid down, certain estate among actual individual persons, or to ensure the enjoyment and advantages of a particular thing or undertaking to an indefinite number of individuals.

As regards the legal persons of the first kind, the division of the estate in the eye of the law takes place at the seat of the company ; but if the law of that place does not recognise operations such as the company proposes to carry on, then the object of the association cannot in the eye of the law be attained at all. But with respect to the second class, it is just as plain that if the State in which it is proposed to establish the undertaking will not permit it to be established, the object of the association as a matter of fact can never be attained. A foreign State which should recognise as a legal person what was not so recognised in its own State, would be treating as valid legal facts directed to ends that are either legally or actually impossible,—a result at variance with general logical principles.<sup>3</sup>

Rights which are generally conceded in our State to legal persons of the kind referred to, cannot be refused to legal persons of foreign States which have been recognised by us, since this is what the general principle of legal equality between foreigners and natives requires.<sup>4</sup> But, on the other hand, foreign institutions and associations cannot make available in our State privileges which are only conceded to them in their own,<sup>5</sup> and rights which native legal persons must specially acquire—*e.g.*, the privilege of holding real property—cannot be conceded<sup>6</sup> to a foreign person except by the special

<sup>3</sup> Cf. Mohl, *Staatsrecht, Völkerrecht, und Politik*, i. p. 621 : "It is easy to prove that the position of a company in its international relations is dependent closely upon its native legislation and its actual treatment there. An association, which has no legal existence in its own country, does not exist for foreign States ; circumstances abroad cannot put any other face on it than it really possesses at home."

<sup>4</sup> So Wächter, ii. 182 : The practice of the Supreme Court of Würtemberg allows to charitable institutions of foreign countries the privilege of the forty years' prescription.

<sup>5</sup> Unger, p. 165.

<sup>6</sup> Savigny, § 365, Guthrie, p. 167, describes such restrictions upon legal persons as restrictions upon capacity of contract. They are, however, more properly restrictions upon legal capacity (on this important distinction, see

indulgence of our State. The opposite view would place our own subjects at a disadvantage with foreigners. It is also an obvious exception to the rule that foreign institutions and associations are to be treated by the law just as our own, if the rights in question are by special provision or by implication from native laws applicable exclusively to native juristic persons. The latter is the case, for example, with reference to the special privileges of the public purse.<sup>7</sup> One cannot imagine that our subjects should be placed at a disadvantage in questions with a foreign treasury. On the other hand, charitable institutions, unless they have some exclusive object confined to their own State (*e.g.*, an hospital admitting only subjects of its own nationality), can lay claim to all rights which we concede to charitable institutions in our own country.<sup>8</sup>

*Note D. on § 41.*

["It is an established rule of private international law that a corporation duly created according to the laws of one State may sue and be sued in its corporate name in the courts of other States. . . . But as regards procedure and parties to actions, the law of the country in which the action is brought prevails." Lindley, on Partnership, App., p. 1483 ; cf. also Westlake, § 286. The powers of the corporation, the limits of its legal capacity—*e.g.*, its capacity to hold land—must of course be determined by the law of the country where it proposes to exercise its powers or capacity ; the law of its domicile will determine whether it has been validly incorporated, but it will not be allowed to trade at the expense and to the disadvantage of foreign corporations, because, in the country of its own domicile, legal persons are free from the

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§ 42 *infra*). But since he assumes the *lex domicilii* as universally regulative of the capacity to contract, he cannot escape from the result, which undoubtedly is at variance with practical tact, that religious or other foreign foundations should not be subject to rules that are recognised in our country against the accumulation of real property in the so-called dead hand, except by the inapposite proposition, that such prohibitions rest on considerations of political economy.

<sup>7</sup> Wächter, ii. p. 181. Unger, who allows foreign churches the privileges of native churches.

<sup>8</sup> Günther, *ut supra*.

restraints which the foreign law imposes upon them. The extent of the mutual recognition is expressed in the conventions concluded between England and France, 15th May, 1862 ; England and Belgium, 8th December, 1862 ; England and Italy, 26th November, 1867 ; and England and Germany, 27th March, 1874. The operative clauses in these conventions, which are valid in Ireland and Scotland as well as in England, are in nearly the same terms. The most recent runs thus : "Joint-stock companies and other associations, commercial, industrial, and financial, constituted and authorised in conformity with the laws in force in either of the two countries, may freely exercise in the dominions of the other all their rights, including that of appearing before tribunals, whether for the purpose of bringing an action or for defending themselves, in conformity, however, with the laws and customs in force in the said countries. . . . Such companies or associations authorised in either of the two countries, shall only be admitted to the exercise of their business or trade in the dominions of the other country, if found to be in compliance with the conditions prescribed by the laws of that country."

It has been thought (Westlake, § 287) that a company incorporated in one country cannot carry on business in another country, so as to acquire a right to sue on contracts entered into there ; it is said that such a company is trading beyond the limits under which it is constituted, and that a company belonging to a country where the conditions of incorporation are less rigid may have advantages over others constituted in countries where the law requires certain formalities and conditions to be observed, so as to ensure fair trading, or, it may be, for fiscal purposes. The Canadian courts have countenanced this view ; but the English courts, although they have never been called upon to decide the question, have assumed the contrary. The high authority of Mr. Justice Lindley, p. 1484, is to this effect : "It is conceived that a foreign corporation can sue in this country on all contracts entered into with it in this country, provided such contracts are warranted by the constitution of the corporation, and are not illegal by English law."

If the law were otherwise, every company desiring to trade

in a foreign country would require to be incorporated anew, and it might be on a totally new footing. The author (*supra*, p. 154) points out how inconvenient and cumbrous it would be to require this of a foreign trading company : the recognition of the incorporation of a company which has been validly formed under the provisions of a foreign law is demanded by the first principles of international law, which assume that in all civilised countries safeguards of the same kind, although differing infinitely in detail, will be adopted to ensure honest dealing and the administration of justice; and finally, the language of the conventions quoted above seems at once to coincide with theories expressed in the text, and to show what the common experience of nations has found necessary and advantageous. If the doubts of the Canadian courts were well founded, the recognition of foreign corporations and their rights would be so limited as to be illusory.

Following out the same principles, the German courts have recognised and allowed to a foreign company, validly formed according to foreign law, a right of action against German subjects, although the principles of its constitution are forbidden in Germany, and companies so constituted are declared null (*Holthausen & Cie v. Comptoir d'escompte de Paris*, App. St. cf. Cöln. 28th April, 1777). The grounds of this decision are precisely the same as those on which Mr. Justice Lindley defends his doctrine, as stated above.

It may of course happen, that a company which has its principal office abroad, may have established it there with the express purpose of engaging in some trade not permitted in the country to which it truly belongs, and of escaping some restrictions upon the constitution of companies which are imposed by the law of the country to which it truly belongs—*i.e.*, where its directors or managers reside, where its trade truly lies, and where its shares are held; such an illusory establishment will certainly not be recognised so as to oust the penal jurisdiction of the country to which the directors belong, or to dispense with the formalities required by its law (*Compagnie de Chemin de Fer du Nord et de Catalogue*, C. de Paris, 2nd July, 1877). But a mere agency or a subsidiary establishment in France, coupled with the fact that the shares are to a large extent held by Frenchmen, will



not make a company amenable to French law, so that any neglect in its constitution of the requirements of French law, which in the case of a French company would involve its directors in criminal responsibility, can be charged against them in a French court, if the meetings of shareholders have always been held abroad, the capital largely employed abroad, and the chief office situated abroad, the company having been originated and incorporated abroad (*Chandora v. Banque Européenne*, 10th February, 1881, Trib. comm. de la Seine). Nor will the establishment of an agency in France give a company the same status as an individual acquires by residence, accompanied by Government licence to reside—viz., a title to bring actions against a foreigner in a French court (*Rubattino v. Kundz & Werder*, 25th Feb., 1876, Trib. comm. de Marseilles). This latter decision is not in conflict with what has been above taken to be the law of England; a company is treated like an individual, and its right to sue is regulated according to its true nationality,—domicile does not, as with us, give a title to pursue an action in France against a foreigner upon a contract; it is a principle of French law that the right to sue being a “*droit civil*,” does not belong to foreigners; hence a mere trading domicile does not give a right to sue in France, where the defender is also a foreigner, but a foreign company, just like a foreign individual, may sue a French debtor in France, while the constitution of a foreign company will be recognised just as the majority of an individual, and no French shareholder will appeal successfully to the courts of his own country to protect him against resolutions passed by the shareholders of a foreign company, to which he belongs, in conformity with the requirements of the law of the country to which the company belongs (*Buisson v. Ch. de Fer Seville-Xeres, Cadiz*, Trib. de comm. de la Seine, 25th June, 1875); just as no French creditor can appeal to the courts of his own country to give him redress against a resolution passed in the course of the liquidation of a foreign company abroad by the statutory majority of creditors (*Dubois de Lachet v. Cie de Chemin de Fer du Nord de l’Espagne*, C. de Cass., Paris, 18th January, 1876). But again, just as an individual, residing or trading in France, may be sued there by a French creditor, although he is not by birth or naturalisation

a French subject, because it is, according to the French law, the first object of the legislator to protect his own citizens, so a foreign company which has an agent in France may be sued there upon contracts made in France by their agent (*Duché et Fils v. Raymond et Cie.*, C. de Cass., Paris, 18th August, 1875).

The Italian courts have drawn a distinction, which, to a certain extent, accords with the distinctions noted above as existing in France, between the relations subsisting between the company and its shareholders on the one hand, and the relation between the company and third parties on the other. The shareholders are, by a *quasi* contract, bound to submit their relations with the company to the law in force at its statutory seat ; debtors or creditors are entitled to rely upon the law of their own country, if that be the real seat of that branch of the company's trade with which they have had to do (*Florence Land Company v. Guarducci*, Appeal Court of Lucca, 9th April, 1880).

In England and Scotland the possession of an agency by a foreign company will give jurisdiction to the English or Scots courts in matters arising out of contracts made in the course of the business carried on by these agencies or connected with them (Lindley, p. 1485 ; Mackay, Practice of the Court of Session, vol. i. p. 182).]

### C. LEGAL CAPACITY AND CAPACITY TO ACT (*Status*).

#### 1. GENERAL PRINCIPLES.

#### § 42.

The law of *Status* constitutes one of the most important subjects of private international law. All authors who are concerned with our subject at all submit it to a thorough discussion, unless they turn their whole attention to criminal law. But yet their opinions are as divergent in their results as in their foundations. Before discussing details we may make the following general remarks.

In this place authors are accustomed to treat of the following legal institutions collected together under some

such title as that which we have prefixed,<sup>1</sup>—viz., nobility, slavery, civil death, frequently, too, the capacity to inherit, to acquire real property, the loss of reputation (infamy), restrictions on civil capacity by admission into any priestly order, the incapacity of legal and other persons for certain modes of acquisition; and also minority and majority, the incapacity of women for some or for all the acts of civil life, the incapacity of certain other persons for special solemnities attaching to legal acts, the operation of the withdrawal of the capacity to dispose by a declaration of prodigality.<sup>2</sup>

There is, however, between the first and the last named

<sup>1</sup> Savigny uses the expression, "Condition of the person;" Story makes use of the expression, "Capacity of persons," which corresponds with the title we have chosen, and Fœlix comprises the whole subject under the title "Effet du Statut personnel," which includes the operation of all the titles that belong to this subject. In the older writers, we find either this latter heading worded as "*Statutum Personale*," or the expression "*Status*."

<sup>2</sup> We are not concerned here with cases of a defect in disposing power because of the concurrent right of a third person; the case, namely, where a married woman cannot alienate without her husband's consent, by reason of community of goods, or a common debtor dispose of property in bankruptcy.

These cases have also been confused with others which have a superficial resemblance to them, e.g., the guardianship which a husband has over his wife, where women have no power to bind themselves effectually in certain matters without special guardianship. One might have some doubt, in particular, as to the case of the incapacity to make a testament imposed by Roman law upon a *filius familias*, since by pure Roman law at least, with the singular exceptions of the *bona castrensia* and *quasi castrensia*, he could not test even with his father's assent. But this matter is thus explained: a son cannot test without his father's assent, because of his father's right, but neither can he with his father's assent; for then the disposition would not be his own, but his father's, and this is inadmissible, because a testament derives its validity from the individual will; the authorities of the Roman law do not therefore, in any way deny the *filius familias* legal capacity in regard to testaments, the proper *testamenti factio*. L. 16, pr. D. 28, 1; L. 3, § 1 *eodem*.

The question, however, by what law the testamentary capacity is to be determined, does not, properly speaking, belong to this division of the subject; it consists in the power to substitute a self-chosen order of succession for that prescribed by law; and it must depend upon the law which determines generally the course of succession in the particular case, under what condition this power is to be recognised. On the withdrawal of the power of disposing in bankruptcy, see *infra*, § 128.

legal institutions a thorough distinction. In a broader sense, no doubt, one can say of minors, for example, that they do not enjoy full legal capacity, inasmuch as they have not the right to bind themselves independently by legal transactions, or if they have it, they have it in a very limited sphere. But if we are to consider their rights in a closer sense, the sense given to them by private law, by which we mean the legal dominion over a person or a thing, then we cannot say that these persons labour under any incapacity; they may have and they may acquire such rights, like other persons, but they cannot by their acts bind themselves to their own prejudice, nor can they, to that effect, renounce rights. But in the case of the first named legal institutions, their object, in so far as they comprise *privilegia favorabilia* for the persons concerned, is to give these persons the exclusive enjoyment of certain advantages over other classes; and in so far as they imply *privilegia odiosa*, they deprive certain persons of the possibility of acquiring certain special rights, and thus legal capacity, in the narrower sense which we have put upon that term, is either elevated or degraded. The legal rules connected with the first class exist in order to give entire classes of persons a position in the state, and, accordingly, a position with reference to the other subjects of the state, of advantage or disadvantage, secured by law; the rules of the second kind exist in order to ensure a special protection in the relations of private law for particular individuals.<sup>3</sup>

Accordingly, one can easily conceive that foreign rules of the first class will only be recognised in a very limited sense in our country, while those of the second will meet with a far more extensive recognition, since the former propose to regulate the relations of the persons concerned with their fellow countrymen; and the application of such foreign rules of law runs counter to the great principle of equality between natives and foreigners in the eye of the law, if it should happen

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<sup>3</sup> Günther, p. 726-29, distinguishes between natural and positive legal incapacity: the first should be recognised in foreign countries, the last not. But what are natural incapacities? Günther gives no satisfactory answer to this, and his view that the non-capacity of minors, for instance, is natural, while that of a *prodigus* takes its origin in a positive rule of law, is wrong. Had not, for instance, according to Roman law, minors capacity to contract?

that the proposed distinction of capacity is a thing not recognised in our country as applicable to our countrymen.

### § 43.

The older authors proceeded (cf. *supra*, § 4) on the assumption that the legislator can only provide for the persons of his own subjects ; while, as a rule, foreigners are to be exempted from our laws. If then, as in all questions relating to this subject, there is a doubt about the *habilitas* or *inhabilitas* of the person, the *lex domicilii* of the person in question is to rule.<sup>1</sup> The only question is, in what cases are we to assume that there is a *habilitas* or *inhabilitas* of the person? It is obvious that this theory is untenable according to the modern conceptions of sovereignty ; and yet, as we shall hereafter see, it has substantially contributed to form a customary law for Europe.

A later theory starts from the conception of the peculiar and individual character of the person. If the personality of a foreigner is to be recognised, it is said, then the legislature must also recognise the attributes of it ; for the attributes are indissolubly bound up with the person. As, then, the person of the foreigner is closely subjected to the law of his domicile, so the universal applicability of the *leges domicilii* to all the attributes of the person results as a consequence. "*Statuta in personas directa quaeque certam iis qualitatem affigunt, transeunt cum personis extra territorium statuentium, ut persona ubique sit uniformis ejusque unus status.*"<sup>2</sup>

Others express it thus : "The *status*<sup>3</sup> of a person must be the same everywhere." The difficulty for the upholders of this theory is to define what laws give a person his attributes, his *status*. Some stand by the general proposition that, if the law makes a person capable or incapable of any relation, this

<sup>1</sup> Bald. Ubald in L. 1, C. de S. T., No. 58, 78, 92 ; Alb. Brun., art. 8, § 127 ; Alderan Mascardus, concl. 6, No. 14, *et seq.*

<sup>2</sup> Stockman's Decis., 125, No. 8, cf., too, Christianæus, Vol. II., decis. 3, No. 3—"ob, ut ita loquas, afficientiam personæ." Walter, D. Privatrecht, § 43.

<sup>3</sup> D'Aguesseau's Works, iv. p. 638 ; Boullenois, i. p. 26, 153 — *L'homme étant le même partout.* Merlin Rép. Testament, sect 1, § 5, art. 1.

is plainly a statute which will be everywhere recognised in foreign countries as a personal statute,<sup>4</sup> be this declaration of capacity or incapacity to enter upon legal transactions and to acquire rights a general one, or merely extending to some special transactions and rights.<sup>5</sup> Others again only allow the *lex domicilii* to decide, if it determines the whole *status* of the person, but do not allow it to do so if the person is declared capable or incapable with reference to some particular acts only. As a matter of fact, rules of law of all kinds may be so expressed that a person is thereby declared capable or incapable of some particular act (*e.g.*, the rubric,—“The half of every succession, unless the deceased shall have the power of testing upon it, falls to the heir-at-law,” is equivalent to “every man has the capacity of testing upon the half of his estate”); and so this rule seems suspicious if stated without restriction. The point most at issue is as to what is to be the decision in cases where we are concerned with the capacity or incapacity for particular acts and not with the entire *status*; and it is often excessively difficult to decipher the appropriate meaning from the obscure expressions of the author. According to Argentæus (No. 16-18), a statute of the former kind is always a real statute, which is dependent upon the *lex rei sitæ*. The strange distinction of Burgundus (i. § 3, ii. § 4), who holds that the *lex domicilii* should rule so far as the question is one of personal obligation, but the *lex rei sitæ* on the contrary, so far as the question is one as to the transference of a real right, has been already (§ 7) mentioned.<sup>6</sup> It would be difficult to reconcile this rule with the principles of any law so as to hold a transference good, where the cedent had not the power to undertake the personal obli-

<sup>4</sup> Danz., D. Privatrecht, i., § 53; Glück, part i. p. 288.

<sup>5</sup> Rodenburg, 1, 3, §§ 4-6, ii. 1, § 1; Bouhier, chap. 24, No. 1-9; Duplessis. Consult. Œuvres, i. ii. p. 155; Mevius in Jus. Lub. proleg., qu. 4, § 25, §§ 4-6.

<sup>6</sup> He is followed, for instance, by Stockmans (decis. p. 125, No. 10-11) and Christianæus (vol. ii., decis. 56, No. 7); so, too, Story, § 431. The whole theory is explained by the desire not to fall into conflict with the rule recognised as necessary, by which the *lex rei sitæ* determines the succession (according to many other French writers and according to English law). Most of the illustrations cited by the supporters of this theory have reference to the capacity to execute a testament.

gation involved in the transference. P. Voet<sup>7</sup> denies altogether the operation of any *statutum personale* in reference to foreign real property.<sup>8</sup> Others make a distinction, in the case of special statutes which do not determine the entire *status*, between those which concern persons and those which concern things: in the former case they allow the *lex domicilii*, in the latter the *lex rei sitæ* to rule.<sup>9</sup> Here, too, as in the case of the theory of *statuta personalia, realia* and *mixta*, it is impossible to determine when a statute refers to a person, and when it refers to a thing. But from the illustrations which these older writers employ, one sees plainly that their theory of these special capacities and incapacities is merely an attempt to carry out universally rules which have been found to fit the expressions of some particular system of law in the subject of succession and the property of married persons. In this connection they had generally before them the rules of the older Germanic law, by which succession and the rights of married persons were special modes of acquiring individual assets of

<sup>7</sup> Cap. 2, § 4, No. 6, cf., too, No. 9.

<sup>8</sup> It may be noted that Burgundus, like almost all the older writers, maintains the rule that moveables follow the person.

<sup>9</sup> Boullenois i. p. 48: "*Les statuts personnels particuliers sont ou purs personnels ou personnels réels selon l'objet qu'ils peuvent avoir. Mais il y a cette différence entre le statut particulier pur personnel et la Statut particulier personnel réel en ce que le premier se porte par tout. Le second n'affecte la personne que pour le fonds dont est question . . . doit être par conséquent, borné aux biens situés dans l'étendue du domicile, parce que l'état général des personnes se porte partout.* I., p. 175: "*J'examinerai d'abord, quel est l'état et la condition de la personne dans le lieu de son domicile. Si je la trouve incapable par état j'en conclurai qu'elle n'en peut aucuns (actes à l'étranger.) Du domicile de la personne je passerai à la loi de la situation, et j'examinerai, si ces actes permis à celui, qui est capable par état par la loi de son domicile, lui sont défendus à raison d'un Etat contraire qui aurait lieu, ou les biens sont situés, ou s'ils sont indépendamment de l'état. Au premier cas le statut personnel du domicile se trouvant croisé par le statut personnel du lieu de la situation, celui du domicile l'emportera sur celui de la situation. Au second cas le statut personnel du domicile cédera au statut réel de la situation.* Merlin Rép. Stat. Autorisation Maritale, § 5, cf. Cochin, Œuvres, i. p. 545. The theory set forth in Cocceji's dissertation, and afterwards with some change by Hert, resembles that of Boullenois (c. occ., tit. v., § 3-6, tit. vii., § 3, 4, 10; Hert, iv., § 4-10), by which the incapacity of a person in general depends upon the *lex domicilii*; but the capacity to undertake particular transactions, or to dispoise upon particular things, depends upon the *lex loci actus*, or the *lex rei sitæ*, as the case may be.

property, and in which, by well-established usage, the *lex rei sitæ* alone was applicable. These rules spoke of the capacity or incapacity of persons, with reference only to the testamentary instructions of a testator, or the power of spouses to give each other property, and these expressions had in one way or another to be brought into harmony with the general theory, which made the *lex domicilii* the rule for determining the capacity or incapacity of persons.

The same controversies may be found among the authors who refer the validity of the *lex domicilii* to the mere *comitas* of the foreign legislator, and to a customary law.<sup>10</sup>

Wächter sets up a special theory as to the import of this law of custom<sup>11</sup> (ii. p. 172). The attributes of foreigners, in so far as they are recognised by the law of our land, must be determined by their own law, unless there is some provision with us with reference to attributes of the kind, by which it is plainly intended to lay down a rule for every one unconditionally, no matter whence he comes. On the other hand, the Court must determine the legal operation of these attributes according to the laws of its own State, unless the question is merely one as to the capacity of a foreigner in a foreign land to enter upon contracts, and to oblige himself, which must be determined by the laws of his own State only.<sup>12</sup> A foreigner then, who, by the law of his home, is still a minor, must be treated by us also a minor, but our Courts will only allow him the same rights as our laws allow to our minors. If he claims a *restitutio in integrum* from our Courts on account of his personal privilege as a minor, the

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<sup>10</sup> Huber de confl. Lib. i. tit. 3, § 12, no doubt, pronounces in favour of the *lex domicilii* universally, with the exception of the capacity to test, an exception he gives no justification for, and determines by the *lex rei sitæ*; Pardessus v. No. 1483, and Massé ii. p. 91, takes the other side, because such special restrictions are entirely capricious.

<sup>11</sup> Beseler follows him, i. p. 151.

<sup>12</sup> This theory is connected with a judgment of the 1st Civil Senat of the Supreme Court of Appeal at Lille of 21st Sept. 1846 (rep. in Seuffert 13, p. 102-3), "The rule that the judge shall always decide according to the law of his country, must always hold good. The exception which has been established by special custom, by which the existence of minority in a foreigner must always be determined by the law of his dwelling-place, cannot be extended so as to determine the legal consequences attaching to such minority."



judge can only give him that in so far as our laws permit it. A foreigner who is a nobleman by the laws of his own country is also to be held a nobleman by ours, but our judges cannot give him any rights on account of his nobility, except what our laws give our noblemen.

Savigny<sup>13</sup> establishes the universal validity of the *lex domicilii*, upon the assumption that it is impossible to apply any other law than that local law to which the person belongs by residence to the various personal conditions and qualities by which his status is to be determined. He rejects the distinction taken by Wächter between these attributes themselves and their operation, as also the distinction between a general and a special capacity for contract, and the only exception he admits is in the case of institutions of an anomalous character, which lie outside the limits of the community of law that obtains among independent States, *e.g.*, the capacity for polygamy, or the incapacity of certain religious persons to acquire property. It is only in such exceptional cases that the law recognised at the seat of the Court is to rule.<sup>14</sup>

A fourth theory is founded on the consideration that the tie which exists between the State and individual subjects thereof is not undone by a temporary residence in a foreign country, and therefore the subjects of a State, even in a foreign country, remain subject to their native laws (Hert, iv. c. 8 ; Renaud D. Privatr., i. § 43, p. 103). This consideration, however, falls to be rejected, in respect that although the State may rule its own subjects according to its own laws, in case its courts may have to decide the question, the foreign State is in no sense bound to assent to this (Wächter, ii. p. 169 ; Story, § 73). An argument, specially advanced by Renaud, upon the ground that different States mutually recognise each other, contributes nothing to the determination of any question of private law : the State can require no more than that, as regards political rights and duties, her subject shall not be compelled to duties, and shall not share in rights, so long as he remains her subject, which are inconsistent with that character.

Others allow the *lex domicilii* to rule, on the ground that

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<sup>13</sup> § 362 ; Guthrie, p. 148 ; Gerber, too, § 32. Unger, i. p. 163.

<sup>14</sup> § 365 ; Guthrie, p. 166. Sects. 349 and 365.

personal attributes constitute the vested rights of all persons (*e.g.*, Maurenbrecher, i. § 144). We have, however, already said all that is necessary on the theory of vested rights (p. 48): against the application of it to the law of status we have also this consideration that, even by the laws of one and the same State, such personal attributes, as they are called, cannot be held to be vested rights.

We may adduce the following considerations to meet all other theories, whether they assume the validity of the *lex domicilii a priori*, or establish it upon a law of custom. The rules of law we are now dealing with, it is said, have to do with the condition and attributes of the person. This condition and these attributes are, however, clearly of a legal character; they exist by force of a positive law, and when that law ceases, these legal attributes themselves cease also. If then, by a logical process, we deduce the universal validity of a rule of law from the fact that it determines the attribute of a person, that is a mere analogy drawn from the physical attributes and conditions of persons, which, no doubt, remain the same in every country, and is an inadmissible argument. A law that deals with the attributes of persons, according to the common form of expression, has this precise meaning, that rules of law different from the ordinary rules are to be applied to some particular legal relations of some particular persons more definitely designated by certain facts. But now it happens that the law has attached to certain actual peculiarities of certain persons, which are either permanent or exist for a considerable time, the application of a number of important rules, which differ from the ordinary rules. One is then accustomed to designate these actual *de facto* peculiarities as legal attributes and conditions of the person. But it is entirely arbitrary which of these actual physical peculiarities shall retain a name that shows their legal significance; and, for instance, alongside of the ordinary class of "minors," "majors," "prodigals," "nobles,"<sup>15</sup> and so on, one might set other classes, such as "landowners," "absentees," "burgesses," "rustics," "those

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<sup>15</sup> One is a noble who is descended, as matter of fact, in a particular way from particular families, or who by special State recognition is raised to an equality with those so descended.

without rights of succession," &c. If there is, therefore, asserted to be a general customary law, which lays down that the attributes of a person, or his condition in the eye of the law, shall be determined by the law of his domicile, it must be shown in detail what are these actual attributes and peculiarities attaching to a person, which are to have, even in foreign countries, some particular legal effect, because by the laws of the domicile of the person to whom they belong they have such an effect, even although the law of the foreign country may attach no such legal effect to them. It is not allowable to proceed by inference from one set of facts to another because both of them are described as attributes of the person; it is only possible to proceed on grounds which justify an analogous extension of rules of law in other cases. We shall enquire specially in the case of each particular legal institution how far the results that follow from general logical principles are modified by customary law.

#### § 44.

Authors who take as their starting-point the conception of legal attributes, or legal condition of the person, acknowledge, as a matter of fact, that in certain cases exceptions are admitted—as, for instance, in the case of slavery or civil death; but if it were a logical truth that the attributes of a person are to be recognised as operative all the world over, there could not be any exceptions at all recognised. It is, however, quite conceivable that the courts of one country should hold a person to be incapable of contracting, while those of another hold him capable, and that the *lex fori* should rule; or that a man who can validly enter upon contracts in one country should be held by the courts of all countries to be incapable of contracting in questions as to obligations on which he has entered in another country, and that so the *lex loci contractus* should rule. In support of this latter theory, which prevails largely in English and American practice, there can at least be urged reasons of expediency of no light weight.<sup>1</sup>

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<sup>1</sup> Burge, i. p. 129 *et seq.*; Story, § 72 *et seq.*; Solchow, too, *Elementa Juris Germanici*, § 57, proposes that the *lex loci actus* should determine generally the capacity to contract.

We have the following observations to make on the *lex fori*, which is recognised by some as a universal rule in consequence of the general principles which they postulate,<sup>2</sup> and by others as a rule applicable in cases where anomalous legal institutions are in question. No doubt the judge to whom the parties have recourse, whether by a voluntary prorogation of jurisdiction or by their forced subjection to his authority, is bound by the law of his own country, to which he owes unconditional obedience. But the law which is good at the seat of the court, is of but little importance for material legal relations. A process is in its nature intended not to give the parties any new rights, but to expound distinctly their rights as they already exist. Therefore, although it cannot be denied that a process constitutes a new legal relation between the parties, with mutual rights and duties, and, moreover, that, by the sentence of the judge, from the very fact that it is his duty to expound finally and distinctly the rights of the parties already in existence, a right already existing may, if the judge shall err, be substantially altered or destroyed, or a right that has not hitherto existed may be created, the judge must nevertheless proceed on the principle that his judgment must be recognised as valid by the courts of all countries;<sup>3</sup> for the very reason that he is only called upon to declare rights already existing. The only recognised exception is when the judge, by applying the foreign law in question, would, in the eye of his own law, aid the success of immorality.<sup>4</sup> And so since the Middle Ages the proposition has been constantly maintained by almost all authors, that material legal relations (*litis decisoria*) are, as a

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<sup>2</sup> Cf. L. Pfeiffer in the work referred to above, § 24.

<sup>3</sup> Arrêt du Parlement de Paris, 22nd April, 1738, Boullenois, ii. p. 489 : "*Quand les parties ont contracté ensemble et que les contestations qui naissent de leur contract sont portés dans un tribunal étranger, il faut juger comme on jugerait dans le tribunal naturel des contestations.*" Heffter, p. 71 : "No system can ever exist by which the existence and the conditions of a legal relation, which has been generated in a foreign State, should be determined by the native laws of any other, in which a question as to its operation may exist. In this way an ultra-territorial and even a retroactive force would be given to the laws of that State."

<sup>4</sup> Cf. on this question, and the so-called anomalous legal institutions, *supra*, § 33.

rule, independent of the law of the seat of the court, and that legal relations which substantially belong to the law of process are the only relations which are to be determined by the *lex fori*.<sup>5</sup> The opposite view, if different courts should be competent, and different systems of law are therein administered, makes the legal relation dependent on the pleasure of the pursuer.<sup>6</sup>

As has already been remarked, we care not in this discussion whether, according to the language of some particular law or code, the attributes or the condition of a person constitute its subject or not. So long as a definite conception of personal attributes or condition is entirely wanting, it is impossible to carry through systematically such a classification according to the forms of expression used in the statutes, even although one should desire to refrain from all deductions that might be drawn therefrom. Such a conception is, however, wanting; and one author brings this, another that, subject, under the common title. In this view, one should compare the discussions of Savigny and Wächter with those of Fœlix and Story, the latter of whom, for instance, treats a great part of the law of the family under the heading of "Capacity of Persons."

The first requisite is a precise line of separation between the rules of law that belong to this connection; and it seems proper to discuss in this place these rules only which determine the general legal position of the person. This position may vary from two points of view:—In the first place, it may vary according as a person has in a higher or lower degree a higher or lower legal capacity—*i.e.*, a capacity to

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<sup>5</sup> Paul de Castr., ad Leg., 1 C. de S. Trin., No. 11; Bald Ubald in L. 1 C. ne filius pro patre, No. 10; Curt. Rochus, De Statutis, § 9, 38-42; Mascardus, cond. 9, No. 8; Burgundus, 7, No. 5; Boullenois, i. p. 533, 536; Hert., iv. 70; Merlin, Rép. Vo. Preuve, I. vi. p. 120; Kierulff, Civilr., § 5, p. 76; Mittermaier, in Archiv. für die Civ. Praxis, vol. xiii. p. 298; Wheaton, i. p. 495; Massé, ii. No. 262; Seuffert, Comm., i. p. 233; Wächter, ii. p. 177, Note 298: "Our laws have not in view the capacity of the foreigner, who contracts in a foreign country, to enter into contracts."

<sup>6</sup> Rodenburg, ii. p. 2, c. 4 § 5: "*Pluribus in locis nos aliquando defendere tenemur nec propterea negotium judicatur ex more loci ubi judicatur.*" Gand no doubt is of another opinion, No. 284: "*L'attribution de jurisdiction emporté virtuellement celle de législation.*"

have certain rights, or to acquire them; and, in the second place, it may vary according as the general capacity of a person to dispose of his whole property, or parts thereof, is in question. All other rules of law do not touch the essence of the person; their only operation is upon particular rights which accidentally belong to it.

It follows, in the first place, from the conception of a person, that he should be the subject of rights; not, however, that he should have definite concrete rights; it is, however, indispensable for an individual who is to take rank as a person, that he should have the capacity of having rights. The second test of personality, which is not, to be accurate, necessarily bound up with the conception of personality in every case, but which is indispensable for general legal intercourse, consists in this, that the person should have a legally operative will, that is, should be capable of acting. Rules of law as to capacity to act belong to this subject; persons are by the very meaning of the term capable of legal rights and legal acts; all other rules of law fail to touch the essence of personality. In cases, therefore, where particular concrete rights are conceded or denied to a person, there is no question of the essence of the person, but merely of accidental circumstances belonging to that conception. One might be disposed to include in our subject the family rights of a person, but a complete personality is not, according to modern legal conceptions, conditioned by the fact that the person belongs to a particular family.<sup>7</sup>

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<sup>7</sup> The distinction mentioned above as having been taken by Wächter between the attributes of a person and the legal operation of these attributes rests upon a confusion between the privileges of special classes of persons, which occur in concrete legal relations, and the capacity to enjoy rights and to act, that is to say, the rights of personality in the proper sense. It is, for instance, quite accidental whether or not a minor is in a position to avail himself of the privileges which belong to minors on the head of prescription of actions, or by the *in integrum restitutio*; he may by the law of the land to which he belongs be a minor, and so incapable of acting, and yet by that law be denied the privileges belonging to prescription of actions, or the *in integrum restitutio*. Both depend on the system of law to which the legal relations wherein it is desired to make use of these privileges, are subject; the privileges attaching to the prescription of actions are merely an abrogation of prescription for that particular case, and so, too, with the *in integrum*

It will be shown by the following considerations that our subject is limited to the general capacity for legal transactions. If by positive law a person is declared generally capable of disposing of his whole property *inter vivos*, but incapable of entering upon some particular legal transactions, the real personality of the individual so restrained is not affected. That person has full power to transfer all his rights in another way.

If we were to hold a person, who is prevented from binding himself by some particular form of legal transaction, or from transferring his rights in some particular way, to be of limited capacity, we should in like manner be bound to hold

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*restitutio*, which constitutes a ground for withdrawal from a legal relation already entered upon, or for the restoration of a legal position that has been lost. Whether a man, who by the law of his domicile is a minor, but a major by the *lex loci actus*, could claim the privileges which the latter law gives to minors, depends upon whether this law gives such privileges only to persons up to a certain age, or to all those who, because of their minority, are under guardianship, and cannot attend to their own affairs. In reason we must take the latter solution, and, as the facts are in accordance therewith, those persons who by the law of their homes are under guardianship, may lay claim to these privileges (Cf., however, remarks on the *in integrum restitutio*, *infra* § 56). Even although the examples given by Wächter are rightly determined by him, the counterargument of Savigny is applicable, if it is sought to apply that distinction to the status and capacity of a person. "That distinction," says Savigny, § 362, Guthrie, p. 150, "between the attributes of a person and their legal effects, rests simply upon the circumstance that many conditions of the person are designated with special names, while others are not. This accidental and indifferent circumstance cannot justify the application of different territorial laws to them. We call him major who has the fullest capacity to act that age can give him; it is, therefore, merely a name for certain legal effects, for the negation of certain earlier limitations on his capacity. So, too, we call him minor who does not as yet enjoy that full capacity. If a law, however, lays down certain stages of capacity for minors, without giving these stages any special name, there is no reason why these stages of capacity should not be determined by the law of the domicile as well as the entry upon full capacity."

This reasoning destroys Savigny's own theory. He, too, derives the application of the *lex domicilii* from the fact that it deals with the legal condition of the person as affected by the various rules of law in question. The special legal condition of a person is, however, merely a way of expressing that under certain circumstances special rules of law are to be applied to the person in question which are not applicable to the legal relations of other persons.

the whole inhabitants of a country, in which some particular legal transaction is not recognised, as limited in their capacity. (For instance, in one country it is women alone who are not allowed to bind themselves by bills; in another, no one is permitted to do so). A limitation of the capacity to act in its true meaning only occurs when a person is disabled altogether from disposing of his whole property, or a part thereof, or of particular patrimonial rights belonging to him, by legal transactions.<sup>8</sup> The truth of this proposition is shown by the example given above. It is often the case that some particular legal transaction is not recognised in some one country; but since persons must, as a rule, have a will that is legally operative, it would be an absurdity if all the inhabitants were unable to dispose of their patrimonial rights.<sup>9</sup>

Lastly, because personality ends with death, we must limit the principle to legal acts *inter vivos*. In a strict sense the testator does not dispose of his property; all he can do is to ensure by a declaration of his will that a person shall or shall not acquire a bundle of assets, and shall or shall not take over a bundle of obligations which were hitherto united in his person. Capacity to make testamentary dispositions does not therefore belong either to those essential conceptions which necessarily go to make up an individual person, or to the conceptions of those attributes which usually belong to one. This proposition may be shown to be apposite by the illustration already given. It is quite conceivable that in

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<sup>8</sup> The cases in which a person is prevented from disposing of his property on account of the concurrent right of a third party, have no more to do with this question than the case of a person prevented from disposing of something that is not his own. This distinction, however, as we shall show in treating of the law of property of married persons, is often disregarded, and, it may be supposed, tends to great confusion on the subject (Cf. § 42, note 2).

<sup>9</sup> If in any State the inhabitants were absolutely prohibited from alienating their real property, or only permitted to do so to a certain extent, this would be inconsistent with the modern legal conception of a person and his free will, and no argument could be deduced from it to meet what we have said above. In such a case the whole soil, or part of it, would, as a matter of fact, belong to the State, and every citizen would have right merely to the permanent enjoyment of part of the State property.



some countries, as was the case in Germany in old times, testamentary dispositions should not be recognised ; dispositions *inter vivos* are, however, indispensable for the intercourse of life.<sup>10</sup>

Incapacity to enter upon particular legal transactions does not constitute any limitation of the capacity to act, if the person so restrained retains the capacity to dispose of his whole property *inter vivos*, by means of other legal transactions. Capacity to act is limited by a law which refuses minors altogether the power of disposing of their property by transactions *inter vivos* ; and so, too, by another law which interdicts persons declared major by an ordinance of the Government from disposing of their real property, if they should not happen to have attained the true age of majority ; or by a law which gives minors who have reached a certain age the right to manage and spend the regular income of their property, but declares it to be inadmissible for them to dispose of the capital of their estate. It is not, however, any limitation of the capacity to act when women are prohibited from binding themselves as security, sons not yet forisfamiated by loans, country people or officials by bills, or any one who has not reached a certain age, is prohibited from making a testament. Of course, those legal transactions which are essential to a transference of property, and are indispensable, must be left quite free to the persons in question ; otherwise we should have instances of true incapacity to act. Obligations by bills, or in security, or even loans, do not however rank among the legal transactions necessary for any intercourse even although undeveloped. On the other hand, we have a true case of limitation of capacity, in a small way, if a person is prevented from bestowing charity ; it is then an impossibility for that person to dispose of his property at all upon the footing of receiving no equivalent for what he gives away. Cases of true incapacity to act are therefore easily distinguishable from those of apparent incapacity. This distinction, however, does not in its essence coincide with the distinction which, as we have seen, many writers make

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<sup>10</sup> The theory that capacity to test is an instance of capacity to act, leads to the contradiction adverted to below (§ 108, note 2).

between a general and a special incapacity to act. No boundary can be drawn between general and special incapacity to act, since the ideas of such general and special incapacity are merely relative,<sup>11</sup> and no reason can therefore be assigned for judging differently of the general and special incapacity in international intercourse. General incapacity is merely a collective term for all special incapacities in the ordinary sense. Even these authors who apply different propositions in law to general and special incapacity can give no definition of these terms. The examples of special incapacity to act as a rule coincide with the cases which we have been compelled to designate as not belonging truly to any limitation of personality and the free-will that belongs to it, and it is a proof of the truth of our assertion that these writers attempt to withdraw particular cases of what they term special incapacity from the rules of law that are applicable to general incapacity; because the examples, to which they often refer as well established by the practice of the courts, are the very cases which we have had to distinguish from incapacity to act in view of a more precise definition of that term.

### § 45.

The rules of law, which deal with the legal capacity of a person, determine under what conditions an individual is to be viewed as a legal subject, either generally or in relation to particular isolated rights. It might readily be supposed that, as soon as a question about a foreigner was raised, the actual conditions which are recognised by the laws of the domicile of the foreigner should be substituted for the conditions under which any proposition of law that touches legal capacity is applied to natives. A man, therefore, who by the law of his domicile could not acquire real property, would be equally disabled here, just because he was a foreigner. This would, however, imply a decided encroachment upon a principle which is assumed in modern international law—viz., that foreigners and natives have the like capacity in the eye of the law.

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<sup>11</sup> See, on the other hand, Savigny, § 364; Guthrie, p. 157; Wächter, ii. p. 172.

At the same time, the following considerations prevent this conclusion. Those rules of law on which the capacity of individuals to have rights depends rest really upon the political and moral ideas of a nation. If the law recognised at the domicile of the foreigner were to rule, it would often happen that the very facts and circumstances which would with us confer full rights or some special right, would constitute a ground for denial of these to him ; (*e.g.* in one country Catholics alone, in another Protestants alone can acquire real property.)

Lastly, there are certain rules of law affecting legal capacity which can only be carried out because definite public regulations actually exist in one State, while these regulations do not exist at all or cannot be applied to the particular case in some other State where the person concerned is actually resident : (*e.g.* How is it possible to treat a man as civilly dead in our country because he has been sentenced abroad for a crime committed in another country to a punishment involving civil death, although he has not been surrendered by us to the foreign criminal authorities or confined in prison ?)

We may say, therefore, that the question is to be resolved just as if the foreign law did not exist at all, and all we need regard is whether the actual conditions are present which are essential to the application of some rule that increases or diminishes legal capacity according to that system of law under which the question otherwise falls.

If we are concerned, therefore, with the acquisition of real property, the *lex rei sitæ* will determine the question of the capacity of the foreigner to acquire it.<sup>1</sup>

If the validity of a legal act is called in question because an individual by the law of his domicile is not recognised as a person at all, *e.g.*, because slavery, or some kind of bondage pre-

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<sup>1</sup> This is a case where the falsity of the proposition that in the case of a prohibitive law of that kind the judge must apply his own statutes, is strikingly exemplified. The judge cannot give a pursuer right to a parcel of real property situated abroad, if that pursuer is, by the law of the place where it lies, incapacitated from acquiring it. Cf., too, the rule which Story § 101 describes as generally recognised : "The capacity, state, and condition of persons according to the law of their domicile will generally be regarded as to acts done, rights acquired, and contracts made, in the place of their domicile, touching property situated therein."

vails there, the ruling law is the law of the place in which the individual actually is at the time when he enters into the obligation ; for this was the moment when the will of the contracting parties was directed to the origination of their contract, and it cannot affect in any way the validity of these declarations of will, that at some subsequent time the act is brought into question before the courts of another country, or is to be put into operation in another country, unless there shall have been either expressly or by implication some ratification of the original contract at a later date and in another place. If the opposite view were true, the judge would have to assume the validity of his own law all over the world, and it would scarcely be possible to conceive that there could be any legal rules for intercourse with foreign countries. From this, too, it follows that one who by the law of the place of his actual residence has no legal person, cannot, so long as he remains there, be recognised even by us, as capable of exercising rights or making declarations of will, as by letters. Reasons of practical utility recommend this conclusion also. If one who is ranked as a slave or as civilly dead in a foreign country could emit there declarations of will so as to affect his property situated in this country, the special condition in which he stands might be made the means of extortion and oppression, and the civil death might indirectly, if his property were, by means of declarations made by himself, removed out of our country, have its first effects upon property situated in our country. In such a case, an independent *cura absentis* must be constituted upon the instructions and orders of the person concerned.<sup>2</sup>

Rules of law as to capacity to act have quite a different purpose. It is not their object to withdraw the possession and the enjoyment of certain rights from those who are incapacitated ; it is their care that such persons shall not involve themselves in loss by their own acts. This care for the person must be a permanent one, if it is to have effect ; it extends therefore to all persons who permanently belong to the state, *i.e.*, who are domiciled there. It is, no doubt, conceivable that a system of law should recognise consistently

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<sup>2</sup> Cf. *infra*, § 106.

as minors all foreigners who had not attained the particular age fixed by that law as the age of majority ; but this could only be carried out, if at the same time there were established a guardianship for foreigners who were resident in our country only temporarily.<sup>3</sup> It is, however, plain that this requirement (and it would be necessary to establish a guardianship for every incapacitated person) could not be carried out, and, as a matter of fact, no one has ever thought of developing the idea. It necessarily follows, without requiring proof of the existence of any customary law, according to the reasonable sense of the statutes on the subject, that one who is capable of acting by the law of his own country must be treated by the courts of all countries as capable.<sup>4</sup>

The converse of this proposition, viz., that any one who by the laws of his own domicile is incapable of acting is to be recognised as incapable everywhere, cannot on the other hand be shown to follow as a necessary logical inference. On the contrary, the inference from the purpose of these laws as to incapacity to act, as already expounded, is that foreigners, if they have the capacity to act by the laws of the country where the transaction which may be in question takes place, must be held to have that capacity by the courts of all countries except those of their native country, and those of any other where a similar law to that recognised in their own country is in force. It may be laid down that the legislature will never be inclined to show greater protective care for foreigners than for its own subjects, and if it proclaims that the latter on attaining a certain age no longer stand in need of the care which it exercises over

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<sup>3</sup> No doubt there is in some countries a system of guardianship for those who have landed property ; that is explained by the fact that principles of feudal law are either still recognised there, or erroneously adhered to ; but it does not furnish any objection to our theory, since on the opposite assumption there would have to be a special system of guardianship established for foreigners who had no landed property.

<sup>4</sup> In so far I am unable to agree with the following observation of Wächter (ii. p. 177). "It is not a necessary consequence of the silence of our laws as to the status of foreigners, that they intend to proclaim that their general provisions on that head are inapplicable to foreigners, unless they specially confine them to their own subjects."

minors, but are quite fit to protect their own interests, it would seem thereby to lay down a similar rule for foreigners.<sup>5</sup>

Here, however, we are met by a customary law, which is recognised at least all over the Continent of Europe, according to which this logical deduction is pushed aside, and in this second case also foreigners are judged by the law of their domicile. The origin of this customary law, of which we will give a more particular exposition in connection with the different legal institutions, is explained by the gradual nature of the development of the idea of sovereignty in the individual European States. Jurists looked upon all territorial laws, which deviated from the common imperial, *i.e.* the Roman law, by which the term of majority was deferred as long as it possibly could be, as statutes binding only upon persons who either voluntarily subjected themselves to them (a case that often happened when new towns were founded or new laws enacted), or for whom there could be invented a fiction of voluntary subjection to them, as in the case of those who committed some delict which was punishable according to the particular law there recognised, although not so by common law. Hence came the rule that a law which concerned the person was not binding on foreigners, a rule which applies to cases of the kind in question if it is to have any application at all, since the care of the person of

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<sup>5</sup> This is the result at which the Supreme Court of Louisiana arrived as the ground of a judgment, which is, it must be said, assailed by Story. Story, § 75, says: "Now, supposing the case of our law, fixing the age of majority at twenty-five, and the country in which a man was born and lived previous to his coming here, placing it at twenty-one, no objection could perhaps be made to the rule just stated. And it may be, and we believe would be, true that a contract made here at any time between the two periods already mentioned would bind him. But, reverse the facts of the case and suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country where he resided; and that at the age of twenty-four he came into this state, and entered into contracts: would it be permitted that he should in our courts, and to the demand of one of our citizens, plead as to protection against his engagement, the law of a foreign country of which the people of Louisiana had no knowledge?"

But it is not the mere ground of expediency, that the inhabitants of one country are not bound to know the laws of another, that is to determine the question.

the incapacitated is very prominent in these statutes. To that too was added the fact, which, as we have seen, favoured the rise of the rule "*Locus regit actum*,"—viz., that all the law courts of Christendom were considered as belonging to one great empire united under the Emperor and Pope, if not *de facto* at least *de jure*. Now, if we take a case of incapacity to act, which has its origin in a judicial order,—the incapacity of the prodigal,—this must receive effect everywhere (as the decrees of one court must be recognised by every other court), if it was the deliverance of the *judex domicilii*, and what had been laid down by the *judex domicilii* must also have been laid down by the enactment of the legislator of the domicile, particularly as in the Middle Ages the functions of the judge and legislator were frequently united in one and the same person.<sup>6</sup> This theory, originated by later commentators, has been followed by almost all writers down to the most recent times with a very few exceptions. They disputed over special cases, which were by many improperly ranked alongside of questions of capacity to act; they did not define accurately their conception of that capacity, and thus, in their endeavours to unite a recognised system of practice and all its detailed consequences with their theory of the universal validity of the *lex domicilii*, they set up inconsistent and capricious rules: but in these cases, which, according to the theory we have laid down, belong to the subject of capacity to act, they, and the courts too in their judgments, made the *lex domicilii* the fountain, even although, like J. Voet,<sup>7</sup> and many of his followers, they derived the general recognition of this law from the practice of friendly intercourse among individual States, the so-called *Comitas Nationum*, and not from logical considerations. The Legislature in many cases attached itself to this theory.<sup>8</sup>

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<sup>6</sup> Cf. Barthol. de Salic. in L. 1, C. de S. Trin., No. 14. Alb. Brunus, de statutis, x, § 57.

<sup>7</sup> De Stat., § 7, Cf. with the passages cited below in connection with the different rules of law.

<sup>8</sup> Besides the authors already cited, the following pronounce generally for the validity of the *lex domicilii*: Titius i., c. 10, § 26 *et seq.*; Reyscher, § 82; Phillips, § 24, p. 187; Hofæker, de eff. § 24; Principia, § 139; Hauss, p. 25; Hommel Rhaps. Quaest., vol. ii. obs. 409, No. 3; Eichhorn, § 35; Schäf-

The arguments adduced by some writers — and that mainly in the practical treatises of England and America, from a practical and a political point of view—to meet this theory, cannot be recognised as universally applicable. It is particularly well established that the rule, “*Qui cum alio contrahit, vel est vel esse debet non ignarus conditionis ejus,*”

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ner, § 33; Klüber, 55; Reinhardt, *Ergänzungen*, i. 7, p. 130; Heffter, § 38, 1:—“A foreign State may, no doubt, modify or disregard altogether “the legal relations” (*i.e.*, status of citizenship, in which Heffter includes capacity to act) “when it is called upon to apply them to conditions, persons or things in its own territory; if, however, it does not do so, it implies that they are to be left to be determined by the law of the domicile:” Thöl., § 78 (although with the preliminary explanation that to treat foreigners by the *lex domicilii* is only a statistical rule.) Wening Ingenheim, § 22; Mühlenbruch, 72; Spangenberg, *Dissertations*, i. p. 149 (with a note that this theory has been followed in practice by the Supreme Court of Appeal at Celle.) Mittermaier, § 31. The fourth article of the Statute Book of the Canton of Bern; 1st and 3rd articles of the Statute Book of Freiburg; § 10 of the Regulations of 10th November, 1834, for the Papal States; § 33, §§ 4 and 34 of the Austrian Statute Book (on this cf. Savigny, § 363, Guthrie, p. 156; note on Unger, p. 163) expressly recognise that a foreigner’s personal capacity to act is to be determined by the *lex domicilii*, not merely in the case of subjects who enter into contracts abroad, but also in the case of foreigners who enter into contracts in the territory of these States. Codex Maximil. Bavaricus civ. i. 2, § 17. It is silently implied in the provisions of the Code Civil, art. 3. (So, too, the universal opinion of French jurists, confirmed by constant judgments of their courts.) The same provision is to be found in the 12th Article of the Sardinian Statute Book, Article 3rd of the Statute Book for the Canton Wallis, Article 3rd of the new Statute Book for the kingdom of Poland, Article 9th of the Statute Book of Louisiana. The 23rd, 34th, and 35th sections of the introduction to the Allgem. Preuss. Landrecht contain express recognition of the view defended here as applicable to foreigners who deal in Prussia, although there are one-sided modifications in favour of native Prussians. Prussian ordinance for Courts i. Tit. 1, §§ 5-6. See Savigny, § 363. It is only the Statute Book of the Netherlands, art. 3rd and 9th; the Statute Book for the Two Sicilies, Arts. 6th and 5th; and the Russian Statute Book that apply the law of their domicile to natives who enter upon legal relations in another country, but the law of the country itself to foreigners who contract in it (cf. Foelix, p. 75). The transactions of Saxons in a foreign country, and of foreigners in Saxony, are differently treated in the Draft Statute Book for the kingdom of Saxony, § 7: “These” (the laws of Saxony) “are to be applied just as much to the transactions of Saxon subjects in a foreign country;” and § 8, “The personal capacity of a foreigner for legal relations, is, as a general rule, to be determined by the laws of the State to which he belongs; but if he has entered into an obligation in this country in connection with affairs of ordinary commerce, the capacity that he has by the law of



cannot possibly be applied to those conditions of personality which are created by unknown foreign rules of law. If the court is not required to know the laws of another country, and in every case may require proof of them, how can we be entitled to presume that private persons have such knowledge? It would appear simpler and more practical to apply none but the law of the place where the transaction is concluded, or where it is to be carried out; because we may assume that the parties have voluntarily betaken themselves to these laws, and that everyone who trades in a foreign country must know to what laws he thereby subjects himself.

It must be confessed that the unqualified application of the *lex loci actus* has an unquestionable advantage in practice over the application of the *lex domicilii*, if the latter is to determine not merely the capacity to act in its narrower and true sense, but also the so-called special capacities to act. By this means an intolerable burden would, as a matter of fact, be laid upon commerce. It would require the natives of our country, in entering on a contract, to observe all the formalities, which perhaps are strange, and in the country of

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his own country leaves him, provided that the laws of this country hold him capable of acting." The result of the provision of the Statute Book of Baden, art. 3rd, is not clear, if it adds to the provision of the *Code Civil* the clause that statutory rules as to the form and validity of acts entered upon in Baden are to be applied alike to foreigners and natives; for, as Fœlix, p. 75, appositely remarks, the exceptional rule of determining all the conditions as to the validity of a legal transaction by the laws of the country excludes the application of foreign laws as to the capacity of foreigners to act.

The authors of the Continent of Europe have hardly dealt with the view that the *lex loci contractus* rules universally the capacity to act. Heineccius however, Prælect. ii. c. 11, § 5, lays it down. He raises the question, what is to be said if the contract is concluded at sea or on a desert island? and wishes in such a condition of things to have recourse to the law of nature, and to inquire whether the parties, without respect to their age, have the necessary understanding. But as there is no such thing as a law of nature in the sense Heineccius means, this instance of a desert island, which can scarcely occur, speaks against his theory. As to contracts concluded at sea, cf. *infra*, § 115. Alef's view (No. 32), stands quite alone: "*Quoties de habilitate personæ est disceptatio, toties prævalet statutum quod actui resistit, ideoque quod agitur effectu caret.*" As it is simply postulated it needs no refutation.

<sup>9</sup> Story, § 75 *et seq.*; Burge, i. p. 27, 28.

the other party to the contract have entirely lost their meaning,<sup>10</sup> a thing which it is often impossible to do ; or that the special regulations for particular classes of society should be known to the natives of a foreign country, regulations of which they have no conception, since these classes of society do not exist there. (We shall see that, even where, according to the words of a statute, the capacity or incapacity of a person to enter on legal transactions must apparently be universally determined in accordance with the laws of his domicile, as a rule such a provision is not applied to the so-called particular capacities for acting.) The case is quite different with incapacity to act in the sense in which we have used it. The institutions that are connected with it are to be found in every country in one form or another, because they rest upon the natural qualities of the persons concerned.<sup>11</sup> The native of a foreign country will, therefore, more easily, in the case of such a person, reach the knowledge of the fact that the person with whom he is dealing is by the laws of his domicile incapable of acting. Then, too, the persons included by us in this class, just because they have no power of disposing of any part of their property, or at least of the capital of it, have no means in their hands for carrying on business permanently in a foreign country. A prudent man of business would not be likely to go deeply with them into important undertakings. A man, however, who embarks on transactions of credit with unknown persons deserves no greater protection from the law, if he loses his money by the incapacity of these persons, than if he had done the same thing with insolvent persons.<sup>12</sup>

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<sup>10</sup> We may take the case of the guardianship of the female sex, still existing in some countries, where a husband must merely *pro forma* concur with his wife in entering upon a legal transaction.

<sup>11</sup> We cannot, however, draw a distinction between personal qualities which may and those which may not be presumed to exist, and determine that the *lex domicilii* rules in the first case but not in the latter. So Phillips, § 24, p. 187 ; for what is a quality the existence of which may be presumed, and what one that cannot? Against this distinction see Wächter, ii. p. 168, note 287.

<sup>12</sup> This consideration may also be urged against the universal recognition of the law of the domicile in the so-called special incapacities. The persons in question have all their fortune in their own hands, and may, with the exception that they cannot deal with it in some particular way, make ducks

The cases in which the observance of the law of a foreigner's domicile might unfairly affect the subjects of any State are very much reduced by the principle which is recognised by the laws of all civilised nations—that no one can appeal to his own fraud in legal transactions. Even the Roman law refuses restitution to a minor who had fraudulently represented himself as major. When a man is in his own country, he can only carry out a deception of the kind by falsely asserting for himself a greater age than is the case, or falsely making claim to the *venia ætatis*; but in a foreign country he has the further opportunity of imposition by giving up his age correctly, and asserting that, by the laws of his domicile, that age is held as majority; or by fraudulently concealing what his native laws are, under circumstances which require him to disclose them.

On the other hand, the principle by which the *lex loci contractus* decides, apparently so convenient and simple a principle for intercourse, leads to very grave consequences. Strange results will, as matter of fact, happen: a man is incapable in one place, but in another can bind himself in every way. The ward would in many cases have to make but a short journey to withdraw himself from his guardian's authority, and there would be a great probability that this power would be dishonourably used to damage the minor by means of disadvantageous transactions. It is no answer to this that, if majority is earlier attained with us, younger persons have to take care they do not enter on prejudicial transactions; for one to whom the administration of his own property has been regularly intrusted certainly stands in a very different case, in such matters as these, from one who has the power for a short time in a foreign country, against the will of his guardian, to contract independent legal relations. We must besides recollect that if the incapacitated person were sued in the courts of his own country, these courts would hardly, in judging of his capacity, take as the ground of their judgment the laws of the foreign country; and, on

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and drakes of it as they like. An appeal to privileges which are only recognised in particular legal transactions seems, in a foreign country, to be an attack upon *bona fides*, an essential of commerce, that cannot be tolerated.

the other hand, it is probable that if a jurisdiction had been exercised by the foreign country, they would refuse to execute a sentence in collision with their own law on this point.<sup>13</sup>

*Note E. on §§ 42-45.*

[The subject is so fully discussed in the text, and the references to different authorities are so complete, that there is little to add. Reference may be made to the last chapter of Lord Fraser's work on "Parent and Child," p. 570, *et seq.*, for an exhaustive discussion of the principles of international law applicable to the present question. His lordship comes to the conclusion that in Scotland the *lex domicilii* will determine whether a person is to be considered a minor or of full age, and will also determine what are the privileges of minority. This rule needs no qualification in cases where the foreigner alone is principally concerned: his personal and domestic relations, his powers of managing his estate, and generally all questions other than questions of contract, will be solved, in so far as they are affected by the minority of the foreigner, according to his own personal law—*i.e.*, the law of his domicile. But when questions of contract emerge, the rule must be qualified: we have then to deal with the interests of a Scot who has contracted with a foreigner, as well as with those of the foreigner himself, and international law must deal fairly with both parties. The question for solution in such cases will always be, did the Scotsman know the condition and status of the person with whom he contracted; did he use reasonable care and prudence; was he put upon his enquiry; and has he by his own neglect placed himself in a position of disadvantage? If he has acted prudently and with reasonable care, and if there was nothing in the appearance of the other party or the nature of the transaction to raise enquiry, justice requires that the *lex loci contractus* should govern the rights of parties, and that the foreigner should not be able to shield himself by appealing to his own law of status, of which the other party was ignorant, and to which his attention was not directed.]

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<sup>13</sup> Cf. Story, § 106.

The rule admits, according to his lordship, of another exception ; obligations *in re mercatoria* by a minor engaged in trade, and debts for board and lodging, will bind a foreigner as much as a native, and upon the same grounds.

These distinctions are nearly identical with the distinctions taken by French law. The French law in its general statement is that the term of minority is always to be ascertained by reference to the law of the country of the foreigner's nationality ; and, for example, a Cuban, by whose native law the age of majority is twenty-five, is held incapable of contracting in France before attaining that age (Trib. civ. de la Seine, *Ferron v. de Santa Venia*, 2nd July, 1878.) But this rule is qualified by another—viz., that French courts will protect French creditors, if they have acted in good faith and without rashness. A Cuban of twenty-two years of age, who by the law of his own country would not attain majority till twenty-five, whereas in France twenty-one is the age of majority, had accepted certain bills, and had stated thereon that he was domiciled in France ; the bank which discounted these bills had not been in direct communication with him, but had made inquiries from one of his creditors who had been the medium between them, and had been assured of the full capacity of the acceptor. In these circumstances, the plea of incapacity was repelled (*Fourgeand v. Comte de Santa Venia* ; Cour de Paris, 10th June, 1879).

In Belgium the rule is that the status of each person is determined by the law of his own country : thus a Dutch minor, who is by the law of Belgium major, cannot dispose of his real property in Belgium without observing the precautionary measures which Belgian law requires in the case of the alienation of the heritage of minors. It will be noted that the status of the person in this case is determined by the law of his domicile, none the less that the subject of the contract is real estate (*Erambert v. Clerdent*, Cour de Liège, 31st December, 1879).

In Germany the ordinary rule is the same as generally upon the continent—viz., that the status of the person is determined by the law of his domicile ; but by § 53 of the German Code of Procedure, a foreigner who has no capacity to sue by

the law of his own country, may yet sue in Germany, if the law of that country allows natives of his age to do so.

In America the rule seems to be that laid down by Story, as cited by the author—viz., that the *lex loci contractus* rules (cf. the case of Saul and his creditors, cited *supra*, note 5, and by Story).

In England there seems to be doubt whether minority and majority are to be determined by the law of the place of the contract in question, or by the law of the domicile of the person: on the one hand, in *Simonin v. Mallac*, 1860, 2 S. and T., 77, a learned judge says: "In general, the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made;" while, on the other hand, the very high authority of Lord Westbury sanctions the statement that "the civil status is governed universally by one single principle—namely, that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party—that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy—must depend" (*Udny v. Udny*, 1869, L. R., 1 Sc. App. 457 and 7 M'P. H. of L., p. 89.) Westlake, pp. 45-6, inclines to the view that the doctrine of Lord Westbury may be taken as likely to be regulative of English law in the future].

### § 46.

The following restrictions of the rule as to the universal validity of the law of the domicile which have been made by various authors seem to have no good basis:—

(1.) Many authors confine the rule to cases of collision between different provincial laws.<sup>1</sup> This distinction has been already refuted (*supra*, § 28).

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<sup>1</sup> Holzschuher, i. p. 58: "These provincial laws have all the sanction of the sovereign of the country, and, therefore, all courts that are subject to that authority are bound to recognise and apply them to the legal relations, the transactions, persons, or things for which they are enacted." But the question always is—for what legal relations territorial and provincial laws are enacted. Holzschuher, in the case of foreigners, pronounces for the application of the *lex loci actus*; Puchta, § 113, on the other hand, who lays down the same distinction, for that of the *lex fori*.

(2.) Kori's theory, too (iii. p. 174), by which the *lex domicilii* will rule only in cases concerned with property that is situated in the country, is also without foundation. As we have shown above (§ 24, *ad fin.*), it rests upon an inadmissible confusion between the subject of the judge's sentence and the incidental possibility of carrying out that sentence.

There is, lastly, a question that is variously answered by authors, viz., whether, in cases such as we have discussed, we must have regard to the laws of the country to which the person belonged at the date of the transaction in question, or to that to which he belonged at the date of his birth. The majority of authors who have had regard to this speciality have pronounced for the former,<sup>2</sup> and undoubtedly they are right. Laws which have to do with capacity to act take as their object a permanent protective care for the person, and they are made applicable to such persons only as belong to the State. There is an end put to that protective care if the connection of the person and the State is brought to an end by a change of habitation into another territory; then the person stands under the protective care of the laws of his new home.

Although some writers, such as Merlin,<sup>3</sup> have expressed themselves hesitatingly in favour of the opposite principle, and others, like Bouhier,<sup>4</sup> following the lead of Froland,<sup>5</sup> have pronounced distinctly in its favour with important exceptions, this difference of opinion may be thus explained, if we examine more closely the deductions of these authors:—In the first place, they turned their regard upon the rules of law which regulate capacity to have rights in its true sense (cf. *supra*, § 42), and by virtue of an universal custom,

<sup>2</sup> Argentæus, No. 47-49; J. Voet, Comm. in Dig. iv. 4, No. v. 1, No. 101; Burgundus, ii. No. 5, 6, 8; Rodenburg, ii. p. 2, c. 1, §§ 4, 6, Pothier, Cout d'Orleans, c. 1, art. 1, No. 13; Hert, iv., No. 5-8; Brinckmann Wissenschaftl. Rechtskunde, i. p. 20; Phillips, p. 189; Burge, i. p. 118-9; Story, §§ 59, 69; Savigny, § 365; Guthrie, p. 169-70.

<sup>3</sup> Rép. Autorisation Maritale, § 10, art. 4; Majorité, § 4; Effet rétroactif, §§ 3 and 2, art. 5 and 3.

<sup>4</sup> Chap. 22, §§ 4-10, 147-8.

<sup>5</sup> On that question see Story, § 55a.

in the conspicuous case of nobility, a nobleman who leaves his own country for another, as a rule retains in that country the privileges of nobility. In the second place, these authors draw into this connection rules of law which are concerned not with the question of capacity to act but with the rights of third parties over an entire estate, and the consequent want of power of alienation, *e.g.*, the rights of a husband to the property of his wife. Lastly, however, they think it absurd that one who has already attained majority at home by his native laws, should again be made a minor by the law of his new domicile, if it requires a more advanced age. This result, however, as we shall see below, is removed by means of another consideration.<sup>6</sup>

## (2.) FREEDOM AND SLAVERY ; BONDAGE.

### § 47.

It may be considered as admitted by all the authorities, that any one who is in his domicile a slave is recognised as a free man, so long as he is in a country which does not recognise slavery.<sup>1</sup> The question, as to whether a man is a slave or free, coincides with the question whether he is capable of any legal rights or not, and that result immediately follows from what we have said as to the legal rules upon capacity. We may also refer to the consideration which is in the view of many persons, *viz.*, that slavery must be regarded in a country which does not recognise it as a condition totally at variance with the laws which are laid down for the government of that country. It seems a more doubtful question whether one who has become free will become once more a slave if he shall return to his domicile. As we cannot proceed upon any such hypothesis as that the slave by his stay in the

<sup>6</sup> Cf. *infra*, § 52.

<sup>1</sup> Mornacius, ad L. 20, D. 4-6, ex quibus causis; J. Voet, Comment. in Dig., i. 5, § 3; and so early as 1315, an ordinance of Louis X. of the 2nd July. See Massé, ii. p. 83-4. It was, however, permitted by some other older French edicts that slaves might be temporarily brought to France from French colonies. —Massé. See, too, Groenewegen ad Inst., 1, 8, No. 3; Story, § 96; Wächter, ii. p. 172; Savigny, § 349 and § 365; Guthrie, pp. 80 and 168.

<sup>2</sup> Schäffner, p. 41-6.



other State acquires another personal *status* (see *supra*, § 43, *ad fin.*),<sup>3</sup> we arrive at the conclusion which is recognised in American practice, that a person returning home in this way is again to be held to be a slave there if his stay in the other State has been merely temporary.<sup>4</sup> In any case the slave State would refuse to see any ground for freedom in the merely temporary stay in another country, while the slave could not appeal to the protection of the law of the free State, since he does not belong to it. It is otherwise if the slave acquires a domicile in the foreign State, and thereby becomes attached to that State. The international principle of the free right of emigration requires that he who was a slave should be recognised as a citizen of his new country by all States, and, among them, by that in which he was once a slave. Although it is not at variance with modern international law that slavery should exist in particular States, the validity of this institution must, however, be firmly restricted to these particular territories;<sup>5</sup> and no recognition can be given to this merely local institution even by countries in which rules that are universally recognised provide that the enactments of a foreign legislature shall be applied and protected. It is thus recognised as a well-established rule, even in the United States of America, although every one knows that runaway slaves may be pursued there even in the free States, that if a slave, with his master's leave,<sup>6</sup> lives for a considerable time in a free State, and acquires a domicile there, his freedom must thereafter be recognised even in the slave State.<sup>7</sup>

All that has been said as to slavery must also be assumed to be applicable to bondage, in so far as that does not merely give right to certain services.

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<sup>3</sup> See the ground of decision of the court of Massachusetts, reported by Story, § 96, note 6, p. 121: "Not so much because his coming within our territorial limits, breathing our air, or treading on our soil, works any alteration in his status or condition."

<sup>4</sup> Story, p. 131.

<sup>5</sup> Grotius, de J. B., ii. c. 22, § 11; Pufendorf, de jure Nat. iii. c. §§ 1, 2, vi. c. 3, § 2.

<sup>6</sup> This restriction is explained by the provisions with reference to the pursuit of runaway slaves.

<sup>7</sup> Story, p. 135, Note *ad fin.* [Slavery is no longer recognised in the United States.]

## (3.) CIVIL DEATH.

## § 48.

We have already (*supra* § 45) spoken of civil death. It follows, from the general principles as to the international application of rules that deal with the legal capacity of persons, that a man who is declared to be civilly dead in one country, is not recognised as civilly dead in another country where the institution of civil death is not known; most authors recognise this rule as correct.<sup>1</sup> Even although the institution of civil death is in some cases recognised in the country in question, civil death which has been inflicted in another State can only come into operation under the conditions which are required by the laws of the State which is asked to recognise it, and, in so far as it rests upon a criminal sentence, its operation depends upon the effect which is ascribed to a criminal sentence passed in a foreign country—a question which must first seek its solution in criminal law.<sup>2</sup> The only doubt seems to be, whether the absolute incapacity of inheritance attaching to a member of a religious order is to be recognised when a succession opens to him in a foreign country. In accordance with what we have said before, and on strict grounds, we must answer that it should

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<sup>1</sup> See, *e.g.*, Günther, iv. p. 728; Mittermaier, i. § 30, note 13; Oppenheim, p. 393; Wächter, ii. p. 184; Story, § 92. (Mailher de Chassat, No. 172, would have civil death, where it depends upon a religious vow, recognised in a foreign country, but would determine its effect in accordance with the laws recognised in the foreign State in question.) Savigny, § 349 and § 365; Guthrie, pp. 80 and 168; Boullenois certainly takes a different view, i. p. 64. See, too, P. Voet, de Stat. iv. 3, § 19, "*Si alicui interdictum est arte vel negotiatione sententia non valebit extra territorium Principis.*" Among more modern writers, Schäffner (p. 47) believes that it is impossible to establish any general rule as to the international validity of civil death. As to the non-recognition in foreign countries of acts done by a person civilly dead in the country where he has incurred this sentence, see *supra*, § 45, and Story, § 92.

<sup>2</sup> On the institution of civil death as recognised in France, see Savigny, System ii. p. 151. The question as to whether the marriage of a criminal who has been condemned in France, and by the laws of that country is civilly dead, is to be held as dissolved in a country which does not know civil death, is determined by the law of the domicile. There must always be an enquiry as to what law would otherwise determine the question. Cf. the general principle laid down, *supra*, § 45.

be: we may assume, since subjection to the regulations of such orders is voluntary, that we have an implied renunciation of the succession (cf. Hert. iv. § 13; Savigny, § 365, note *a*; Guthrie, p. 167). Such a case as this, in Savigny's opinion, does not belong to the ordinary class of incapacities to act.<sup>3</sup>

#### (4.) LOSS OF CIVIL HONOUR—INFAMY.

##### § 49.

The enjoyment of social reputation or honour is an essential condition of a number of different rights, which belong partly to public and partly to private law. Legal capacity<sup>1</sup> is diminished if this is lost. It follows, therefore, according to the general principles we have assumed, that we can never fully recognise a loss of civil honour, for the simple reason that a person is laid under it by some foreign country: we must ask, whether the facts on which it proceeds are calculated to work a diminution or loss of the reputation of a citizen by our laws? It might happen, if we are to recognise the sentence of a foreign court making its object infamous, that a sentence of infamy imposed in a foreign country should really be put in force among ourselves, if, by our law, infamy is the result of a sentence for certain crimes; and if, by undergoing certain degrading punishments, the loss of reputation is incurred in our country, then to have suffered punishment in a foreign country under similar conditions must also infer the withdrawal of the privilege of exercising these rights among us. In this sense the more modern authors express themselves.<sup>2</sup> Although most of the older

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<sup>3</sup> [In an action brought before the Appeal Court at Turin on 12th August 1879, to vindicate the rights of the manufacturers of Chartreuse, and protect their trade-mark, it was pleaded that the Italian law of 7th Feb. 1866, which denies to religious houses or orders a *persona standi in judicio*, must be applied to the pursuers, a religious house in France. The plea was not determined, the convent suing in name of an agent or manager, whose title was sustained.]

<sup>1</sup> Gerber, § 39.

<sup>2</sup> Günther, p. 731; Kori, iii. p. 14; Wächter, ii. p. 182; Mittermaier, § 30; Thöl, Introduction, § 78, note 5; Cf., too, Berner, p. 166; Baden Criminal Code, § 9; Story, § 91; and *infra*, § 146.

authors maintain the universal validity of the *lex domicilii*,<sup>3</sup> this is to be accounted for, in the first place, by the indistinct conceptions which these writers have of the laws of status, as they term them, which were supposed to stamp inherent qualities upon every person; and in the second place, by the fact that the question whether a sentence passed by the *judea domicilii* in a foreign country had any effect upon the reputation of the convict, was not properly separated from the question whether a loss of reputation was to be recognised in our State, upon the ground that it existed according to the law of the domicile of the person concerned. Both P. and J. Voet, however, declare in favour of the view we have taken.<sup>4</sup>

The special question, whether a restitution of status bestowed by the sovereign, in virtue of the prerogative of pardon, is to be respected in a foreign country,<sup>5</sup> depends upon the circumstances under which a pardon bestowed in one State is to be recognised in another.<sup>6</sup>

#### (5.) LIMITATION OF CAPACITY ON THE GROUND OF RELIGIOUS BELIEF.

### § 50.

It is now undisputed that limitations of this kind, recognised in one State, will not hold good in another.<sup>1</sup>

<sup>3</sup> *E.g.*, Bald Ubald in L. 1, C. de S. Trin., No. 100; Burgundus, iii. 12; Bouhier, cap. 24, Nos. 134-138; Boullenois, ii. p. 19. Baldus, however, makes an exception of the case where the *poena* affects only an *actus extrinsecus*, *e.g.*, appearance before a court of law; and Bouhier gives the opinion mentioned above, with the qualification that infamy resulting from a criminal sentence will only then be generally recognised if it is in accordance with *Jus commune*.

<sup>4</sup> P. Voet, iv. 3, No. 18; J. Voet, de Stat., § 7.

<sup>5</sup> Hommel, Rhaps. Quæst., vol. ii., obs. 409, No. 3, "*Famæ restitutus a principe domicilii omnino est restitutus*."

<sup>6</sup> Cf. *infra*, § 143.

<sup>1</sup> The opposite assumption would have this effect, that if in one country Protestants could acquire no landed property, the acquisition of landed property would be forbidden to the inhabitants of that country, even in a Protestant State; Savigny, §§ 349, 365; Story, §§ 91, 92; Wächter, ii. p. 173.

## (6.) DISTINCTIONS OF RANK.

## § 51.

Special privileges of rank or position are determined, not by the *lex domicilii* of the person concerned, but by the law of the State to which the legal relation which may be in question otherwise belongs.<sup>1</sup> (For the foundation of this rule, see *supra*, § 45.) The only doubt on the subject seems to arise in the case of the privileges attaching to what is called nobility.<sup>2</sup>

Some authors hold the privileges of nobility as confined strictly to the territory in which they have their origin, either by descent or by grant; others make a distinction between nobility which is enjoyed by virtue of descent and new nobility conferred by the sovereign, recognising the first only as universally valid.<sup>3</sup>

Lastly, a large number of eminent authors consider nobility as valid everywhere, whether it rests on descent or on grant, and make no exception from the rule unless the sovereign should grant nobility to one who is not his subject.<sup>4</sup>

In fact, as Savigny remarks (§ 365 ; Guthrie, p. 168), no general rule can be laid down. It depends upon the import of the rules of law establishing the privileges of nobility whether these privileges are to be conceded to native nobles only, or to foreigners also. Where the only consequences of these rules is to confer distinguishing marks of honour, then, by a general international usage, which certainly cannot be disputed now-a-days,<sup>5</sup> these are conceded to foreign nobles also.<sup>6</sup> Other special

<sup>1</sup> Beseler, i. p. 151 ; Wächter, ii. p. 172, *et seq.* ; Reyscher, § 82.

<sup>2</sup> Hert, iv. § 16 ; Alef, No. 41 ; Casaregis, disc. 43, No. 17.

<sup>3</sup> P. Voet, de Stat. iv. 3, § 16 ; J. Voet, Comm. i. 5, § 3 ; Seger, p. 20 ; Duplessis, ii. p. 456, "*à l'égard des étrangers de race leur noblesse est un droit de sang qui les suit partout.*"

<sup>4</sup> Henr. de Cocceji, v. § 9 ; Boullenois, i. p. 67 ; Bouhier, chap. 24, No. 134 ; Titius, i. c. 10, § 26 ; Günther, p. 130 ; Walter, § 45 ; Renaud, i. § 42, i.

<sup>5</sup> Cf. Martens, § 98.

<sup>6</sup> An exception must be made when a sovereign confers nobility on one who is not his subject. Nobility is intended in its essence to determine the permanent social relations of a person, and these in relation to his fellow-subjects ; it can, therefore, only be conferred upon subjects of the State.

rights, on the other hand, can only be conceded to native nobility.<sup>7</sup> We cannot carry the distinction between hereditary and created nobility with us in this theory, and there is no theoretical ground for its adoption: one as well as the other rests on the laws of the State.<sup>8</sup> As far as Germany is concerned, it may be noted that patents of nobility which have existed since the days of the empire, or which were conferred by the sovereign authority of the empire, are recognised in all German States, not merely from reasons of international law, but because they had been recognised by the older sovereign authority of these countries.

When one passes as an emigrant into another State, nobility conferred in the former domicile will be considered to be tacitly recognised;<sup>9</sup> but if nobility is not recognised at all in the new domicile, it is held, according to the reasons already adduced (*note* 8), to be lost.<sup>10, 11</sup>

#### (7.) INCAPACITY TO ACT ON ACCOUNT OF MINORITY.

#### § 52.

We have already shown why this kind of incapacity to act must be universally held to be regulated by the *lex domicilii*.<sup>1</sup> According to what we have already laid down, it is

<sup>7</sup> Thöl, § 78, note 6: "He who gets his nobility from us has such and such rights; he who gets it from a foreign power has such and such rights: the latter has not in our country the rights called nobility."

<sup>8</sup> Günther goes too far in asserting that nobility cannot be withdrawn from a person by any State, because it is recognised by the collective monarchical States of Christian and European civilisation. Nobility really depends on the law of the domicile of the person. This is the necessary condition of the recognition of it in other States, and the latter must cease to recognise it if the former withdraws its privileges.

<sup>9</sup> Thöl: "A foreign grant of nobility recognised by us gives all the rights called nobility in our country."

<sup>10</sup> Renaud, i. § 42, note 3.

<sup>11</sup> Older authors deal with the rights of illegitimate and legitimated children in connection with the question of legal capacity. By modern legal conceptions, which, as a rule, regard legitimate and illegitimate children as of the same legal capacity, this subject belongs to Family Law. Cf. *infra*, § 102.

<sup>1</sup> Molinaeus in L., 1 C. de S. Trin.; Huber, § 12; Argentré, No. 7; Hert, iv. § 11; Rodenburg, ii. §§ 1, 2; Abraham a Wesel, ad Nov. Const.

the *lex domicilii*, too, which decides whether, and if so, what particular acts *inter vivos*,<sup>2</sup> may as an exception be done by minors.<sup>3</sup> It is, therefore, only now necessary to discuss some peculiarities in regard to which doubt may arise.

(1.) By systems of territorial law it is in the power of the sovereign to confer the rights of majority upon a minor either in full or in part. This grant of majority is made in virtue of the laws of that country, although it requires a special provision of the authority of the State, and it has therefore the force of law; such a case therefore is to be regarded in the same light as if the *lex domicilii* appointed an earlier

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Ultraj., art 13, No. 25; Henr. de Cocceji, v. 3; Bouhier, chap. xxv., No. 1; Boullenois, i. pp. 53, 54; Merlin, Rép. Majorité, § 5; Hofæker, de eff. § 24; Ricci, p. 522; Hauss, p. 27; Wheaton, § 84, p. 117; Walter, § 45; Günther, p. 727; Klüber, § 55; Thöl, §§ 81, 87; Renaud, i. 42-4; Gerber, § 32; Schöffner, pp. 47, 48; Savigny, § 361; Fœlix, i., § 33, p. 85; Massé, ii. p. 84; J. Voet seems to hesitate; cf. Comm., 4.1, § 29, with 4.4, § 8. We have already (§ 7) mentioned the remarkable distinction taken by Burgundus, i. § 6. Gand, No. 482, 83, proposes that the *lex rei sitæ* should rule in cases as to the disposition of real property. On the whole of this subject, however, he proceeds very arbitrarily, and (506) lays down the proposition that the foreigner who contracts in France subjects himself, in so far as his capacity to act is concerned, to the laws of France. It is, however, obvious, that it cannot be in the power of any person to determine his own legal capacity. English and American practice, on the other hand—probably on the grounds of expediency, which have already been refuted—pronounce for the *lex loci contractus* (Story, § 182, § 103). Burge, i. p. 125, approves of this, and allows the *lex rei sitæ* to rule in questions as to the disposal of real property, because, by his view, it would encroach upon the sovereign rights of the individual States if the *lex loci contractus* were taken as the rule for these cases also (p. 120). According to Burge, i. p. 133, the *lex loci contractus* is to decide if the person is by it a minor, but is by the law of his domicile of full age. "For it would not be reasonable that two different laws should be applied to one and the same contract," which is Burge's reason, must be rejected as a *petitio principii*. Burge, like many other authors, confuses the rules of law on this subject with those which deal with the capacity to execute testaments, to enter on marriage, &c. Grotius, de J. B. ii. c. 11, § 2, in the same way makes the *lex loci contractus* rule. He argues from the position that the foreigner becomes a *subditus temporarius* at the seat of the contract. [Cf. *supra*, note 9, p. 186.]

<sup>2</sup> *Mortis causa* deeds are not included. Cf. *supra*, § 44, Note 9.

<sup>3</sup> On the distinction drawn by Wächter between a person's attributes and their operation, see *supra*, § 44, Note 7.

age as the initial age of majority for all its subjects.<sup>4</sup> From this it follows that majority can be conferred by the sovereign on none but his own subjects.<sup>5</sup>

(2.) The capacity of a person to act is settled, as we have seen, by the laws that are recognised at the place of the domicile which that person had at the time of the transaction which is in question. This rule appears to drive us to the conclusion we have already adopted (*supra*, § 46, note 9), in the case of one who has attained majority and changes his domicile to a place where a more advanced age than that attained by him is required for majority; he becomes a minor once more. Some authors have expressly drawn this conclusion.<sup>6</sup> Besides those who regard majority once attained as persistent, in conformity with the general principle assumed by them, to the effect that legal capacity is determined by the laws of the first domicile and cannot be altered, many who hold an opposite view of the general principle make an exception in this case, either on grounds of expediency,<sup>7</sup> which obviously recommend such an exception, or because they regard the majority conferred by the country of the first domicile as a vested right, and not to be lost by any subsequent change of domicile.<sup>8</sup>

Apart from considerations of expediency, to which no force can be given, if an accurate legal view contradicts their conclusions, we must recognise, that, as we saw before, and as Savigny elsewhere admits, the theory of vested rights must be thrown out of the system of international law, since its

<sup>4</sup> Hert, iv. § 11; Hommel Rhaps, vol. ii. obs. 409; Burgundus, i. 12. The Royal Chancellory of Hanover at Celle, on 17th January, 1820, removed a guardian because of a *venia ætatis* granted in another country (Bülow and Hagemann, Discussions, vol. vii. No. 80, p. 244). Hagemann approves. Schäffner, p. 48.

<sup>5</sup> Boullenois, i. p. 55.

<sup>6</sup> Hert, iv. § 12, note 5; Walter, § 42; Günther, p. 727. So, too, a judgment of the Supreme Court of Appeal at Celle, on 14th October, 1831, in affirmance of a decision of the Chancellory of Hanover. Bülow & Hagemann, vol. x. p. 98. Of course, even according to this theory, obligations undertaken at the period of the earlier domicile are not invalidated by the change.

<sup>7</sup> Boullenois, ii. p. 12.

<sup>8</sup> Especially Savigny, § 365; Guthrie, p. 170.



justification is rested on a circle of reasoning. This capacity to act does not belong to the category of vested rights in the ordinary sense.<sup>9</sup>

Savigny thinks that his view receives special confirmation by comparing it with the case of *venia ætatis*, acquired specially at the place of the earlier domicile. The consequences of such a grant by the sovereign cannot, he says, be afterwards withdrawn, and it would be unnatural and arbitrary to attribute less force to the majority established by the law of the earlier domicile than to that established by grant. This last argument rests also upon a circle of reasoning. The special grant of the rights of majority is not any more, or in any higher sense, a vested right, than the statutory majority. If the latter were not recognised at the seat of the new domicile, neither would the *venia ætatis* be recognised. I believe, however, that I may confess I have arrived at the same result<sup>10</sup> on strictly legal grounds. It is necessary that a person should have, in order to an independent and voluntary acquisition of a domicile, capacity to act, and that both by the law of the domicile which he has and by that of the country to which he intends to remove; the former, that he may be able to undo the tie which binds him to his native country; the latter, that he may be in a position to enter into the new allegiance. The authority of the State which permits one who is minor by her laws to establish his domicile independently in her territory, silently recognises the capacity of this person to act; she silently concedes majority, if she permits any one who is not yet major by her laws to establish his abode independently in her territory. To justify this exception there is no need to appeal to the considerations of expediency which we have mentioned; they are quite inadmissible as arguments.

(As to the alienation of the real property of minors, which some authors, who in other cases allow the *lex domicilii* to decide questions of capacity to act, refer to the determination of the *lex rei sitæ*, see *infra* Law of Guardianship, § 106.)<sup>11</sup>

<sup>9</sup> Unger, pp. 130, 131.

<sup>10</sup> This result is recognised in the practice of Prussia. Koch, Comment on § 23 of the introduction to the Allgem. Landrecht. Bornemann, i. p. 53, note 1.

<sup>11</sup> The law of the restitution of minors is discussed, *infra*, § 56.

## (8.) CURATORY OF WOMEN.

## § 53.

The special curatory of women after majority, which we still find in some legal systems, belongs, in accordance with the general principles laid down by us, to the class of incapacities to act, if the curator supplements the will of the woman, and so may refuse his consent to the deed in question, while the woman, without this consent at least, cannot in any way make a complete disposition of the whole or of any part of her estate *inter vivos*. If the curator merely advises the woman in all her more important legal transactions, or in certain specified transactions, then this curatory is only a formal requisite which exists for the protection of the woman, and is subject to the rule "*Locus regit actum*;" if the woman can dispose of her whole estate *inter vivos*, and is only disabled from certain legal transactions without the consent of her curator, then this curatory belongs to the class of incapacities which some call particular, which are more rightly termed apparent. The differences of opinion that prevail,<sup>1</sup> as to whether the necessity of the assistance of a curator is to be determined by the law of the domicile of the woman, or by the *lex loci contractus*, are explained by the varieties of such curatory corresponding to the categories given above; these were in the contemplation of the authors who treat of the subject, and from some one of them they constructed a general rule.

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<sup>1</sup> The universal validity of the *lex domicilii* is supported by Curtius Rochus, de statutis 9, § 26; Boullenois, i. pp. 437-39; Günther, p. 728; Foelix, i. § 89, p. 206. (This deliverance is sound so far as the requirement of the *Autorisation Maritale* existing in the French law is concerned, C. civ. art. 217). The authority of the *lex loci contractus* is supported by Henr. de Cocceji, vii. 10; D. Mevius in Jus. Lub. proleg. qu. 4, § 17, because the assistance of a curator is a mere formality attaching to the legal act—Ricci, p. 537; Witzendorf, de statutis civitatatum provincialium, xx. No. 2; Alderanus Mascardus, concl. 6, No. 111. Wächter ii. p. 180, although he considers that to require the advice or consent of a curator is to limit the capacity of acting (note 302), reaches the result, that we must determine the capacity of women according to our own law, if they deal in our country; this view springs from the distinction between the legal qualities of a person and their operation, to which we have referred. On the other hand, see Savigny, § 362; Guthrie, p. 151, who purposes apparently to apply the *lex domicilii* everywhere.

In more modern times such curatory exists only in the case of married women, whose curator is their husband (Gerber, § 245-46), and it has the effect of making the woman altogether or partly incapable of acting.<sup>2</sup> If the advice of a curator is required by the law of the place of the contract, but is not required by the law of the woman's domicile, then a contract concluded without such advice is not invalid for this reason, that the rule "*Locus regit actum*" makes the observance of the forms required at the place of the contracts, as well as other forms, optional to the parties ; but still, if the forms of the domicile of the parties, and not those of the place of the contract, are observed, there must, as in all such cases, be circumstances to show the intention of the woman to enter upon a binding contract, and, if the curatory of women exists, the judge may, in accordance with his own law, sist process until a curator be appointed, because the woman has not the capacity of suing for herself.<sup>3</sup>

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<sup>2</sup> Merlin's declaration, Rép. Vo., Autorisation Maritale—that the provisions of certain French *coutumes*, to the effect that a married woman can only validly contract with the consent of her husband, constitute a personal law which must be administered by the laws of her domicile—is therefore correct.

<sup>3</sup> Mittermaier, no doubt, has this case in view, Archiv. vol. 13, p. 305, when he proposes that the law recognised at the seat of the tribunal should determine as to the necessity of such curatory. Judgment of the Supreme Court of Appeal at Jena, 17th February, 1827 (Seuffert 4, p. 374): "The curatory of women in Saxony was originally merely a curatory *ad litem* (Procedure in Saxony, i. 43, 44, 46, 47 ; ii. 63) : there is no such thing as an incapacity in unmarried women to dispose of their estate, and for extra-judicial contracts they do not require a curator. The curator required for proceedings in court is a mere adviser, who may be dismissed at pleasure, and whose advice is a mere formality required to validate the transaction. Such an external solemnity prescribed for judicial business is plainly to be judged by the law of the place where the judicial contract was concluded, and cannot be required in places where it is not prescribed. The full capacity of a woman who is not subject to curatory by the law of her domicile must be recognised in every Saxon court, even without the advice of a curator, and in the same way a woman who by the law of her domicile is only to a certain extent fettered by the necessity of a curator's concurrence can validly contract, where such curatory does not exist." Cf., too, the decision of the same court, reported by Seuffert, 13, p. 255, of date 15th December, 1831.

## Note F.

[The law of England as to the capacity of women, *i.e.*, married women, belonging to a foreign country, to contract is not settled. Westlake holds that it must be determined by the same considerations as determine the same question in the case of minors; and as we have seen (*supra*, note 6, § 45), the tendency of more recent decisions is to refer these cases to the law of the domicile, or the personal law, for determination.]

The doctrine of Scots law is not reconcilable with the principles laid down by the author, nor is it coincident with its own rule as to the case of minors; by the law of Scotland the personal obligation of a married woman is null; her incapacity is a case of general incapacity; but yet the rule with regard to the obligations of the wife of a Scotsman in a foreign country, or of the wife of a foreigner in this country, is that these are determined by the *lex loci contractus*; although the incapacity of a married woman in Scotland is perfect, yet if it is not attached to her acts by the law of the place where these acts are done, she will be bound thereby (Fraser on husband and wife, p. 1317). We have seen (p. 186) that the general rule in the case of minority is that the *lex domicilii* will rule.

In America, the rule laid down by Parsons (2. p. 600) is that "it must depend much on the circumstances;" *i.e.*, the length of the stay of the foreigner in the country, and the quality of the contracts, what law shall rule.]

## (9.) INCAPACITY OF PRODIGALS.

## § 54.

The judicial decree by which a person, in consequence of his prodigal life, is declared incapable of acting, prescribes, without doubt, a permanent protective care for him, and receives effect all over the world in accordance with the laws of his domicile. This view has been adopted by authors on the continent of Europe almost without an exception.<sup>1</sup>

<sup>1</sup> Alb. Brunus, de Stat. x. § 57; Barthol. de Saliceto in L. i. C. de S. Trin. No. 14; Alderanus Mascardus, concl. 6, No. 20; Argentr. No. 7; Bur-

It has, no doubt, been objected that interdiction is really a police regulation, although the decree is pronounced by the courts, and accordingly must be limited in its operation to the territory to which the person placed under curatory belongs.<sup>2</sup> But it is in no other sense a police regulation than any other kind of guardianship. There is no ground for distinction in this respect in the fact that it is only found in isolated cases, while guardianship is a thing that occurs more frequently.

The contention that interdiction, resting, as it does, upon the sentence of a foreign judge, can only receive effect under the same conditions as are required for the application of a foreign decree, is more plausible.<sup>3</sup> But it is no act of contentious jurisdiction to place a person under curatory, although it may be that in some countries, in order to give the judicial cognition more completeness, and to insure the person against arbitrary and groundless attempts upon his liberty, the curatory is issued under the form of a litigious proceeding between different parties, as is required by the law of France.<sup>4</sup>

What the judge here adjudicates upon is not a relation of private law between different individuals; he has simply to pronounce a protective order for the interest of that person who is about to be placed under curatory,<sup>5</sup> in which, no doubt,

gundus, iii. 12; Rodenburg, ii. 1, § 4; Huber, § 12 (vouching for the practice on this point); P. Voet, iv. 3, No. 17; Abraham a Wesel. ad Nov. Const. Ultraj. art. 13, No. 26; Casaregis, disc. 43, No. 16; Hommel Rhaps. vol. ii. Obs. 409, No. 3; Nic. Everhardi, jun., Cons. vol. ii. Cons. 28, No. 82; D'Aguesseau Œuvres, iv. p. 638; Boullenois, i. p. 603; Massé, ii. p. 87; Fœlix, i. p. 207.

<sup>2</sup> Günther, p. 729.

<sup>3</sup> We have already remarked (*supra* § 45, note 6) that the older authorities, partly for this very reason, justified the universal validity of the *lex domicilii* in questions of incapacity to act.

<sup>4</sup> Code Civil, art. 513 *et seq.*, art. 489 *et seq.*

<sup>5</sup> French jurists have not so much regard for the object of the procedure as for the procedure itself, which does not affect the nature of the decree. So Fœlix, ii. p. 188. But the question whether we have to deal with an act of voluntary or contentious jurisdiction must be determined on logical grounds, and therefore on grounds that are applicable to every territorial system of law. In French law itself, the provisions of article 491—which makes it the duty of the administrative authority of the state, as a subsidiary resource, to move for interdiction—are evidence that to place a person under curatory is no contentious proceeding of private law.

others may be interested, and with reference to which they are entitled to make suggestions.<sup>6</sup>

If we are to refuse recognition altogether to foreign judgments, then, in a strict sense, a declaration of prodigality which has been made at the domicile of any person must be held to be of no effect,<sup>7</sup> as regards the legal character of the acts which have been entered upon at the domicile of the person under curatory, if they should afterwards come to be matter of dispute before a foreign court.<sup>8</sup> Most authors and courts of law, in their judgments, attempt to get rid of this conclusion by asserting that they find in the sentence of the foreign judge a proof of the existence of the condition that justifies a withdrawal of capacity sufficient to meet their difficulties.<sup>9</sup>

This theory, however, is only applicable in the case of the natural incapacity of lunatics, in which case the sentence of the judge does not constitute the incapacity, as in the case of the interdiction of a prodigal, but is merely a declaration of an incapacity to act, which is already in existence and in operation, made for the security of commerce.<sup>10</sup>

<sup>6</sup> It only needs such publication as is required at the domicile of the person to be interdicted. *Fœlix*, ii. p. 32.

<sup>7</sup> By French law, the judgments of foreign courts are, as a rule, disregarded.

<sup>8</sup> This result, which is at variance with all legal instinct (cf. *supra*, § 44, note 3, Heffter's words quoted there), is certainly produced to some extent by the modification suggested by Gand upon the decision to be pronounced (No. 311), according as the suit is conducted by foreigners only, or by foreigners and French subjects in France. But will it alter the rights of parties if one of them should happen to be succeeded by a French subject as his heir?

<sup>9</sup> *Fœlix*, ii. § 369, p. 113, *et seq.* A judgment of the court at Douai, of 5th May, 1836, affirming that of the inferior court (at Valenciennes, reported by *Sirey*, 36, 1. p. 673, declares that the representative of the bankrupt who has been nominated in a foreign country has a good title to act in France ("*considérant que la qualité du demandeur une fois établie, le titre qu'il présente étant authentique*"). On the other hand, a judgment of the Court of Cassation at Paris, on 29th August, 1826, reported in *Sirey*, 26, 2, p. 428, lays down that a decree of disability pronounced by a foreign court can only be recognised in France after it has been declared to be such as may be carried out there.

<sup>10</sup> So, too, by the Code Civ. Art. 513: "*Les actes antérieurs à l'interdiction pourront être annulés si la cause de l'interdiction existait notoirement à l'époque où ces actes ont été faits.*"

The incapacity of the prodigal has often been ranked with the loss of disposing power which falls upon a bankrupt. This is, however, incorrect. The bankrupt is not incapable of legal acts ; he can certainly enter upon contracts, although the other party does not thereby acquire any rights against the sequestrated estate ; and by Roman law he may enter upon a succession that opens to him. The curatory that exists in bankruptcy is also not merely for the benefit of the bankrupt, but has for its end to protect the estate for the creditors.<sup>11</sup>

This distinction will be made clearer in discussing bankruptcy.

*Note G.*

[“Certainly, in this country no effect would be given to any legal incapacity merely dependent on the decrees of a foreign tribunal until those decrees were here produced. When produced, they might be received as proof of in-

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<sup>11</sup> The operation of a declaration of prodigality in a foreign country was discussed in the decision on 16th January, 1836, by the Cour Royale, at Paris, on appeal in the suit of the Duke of Cambridge—who had been nominated curator to Charles, Duke of Brunswick, by the joint nomination of the King of England and William, Duke of Brunswick, by virtue of their right as agnates, and in respect of their relative's prodigality—against various persons in France, in whose hands Duke Charles had placed sums of money. Counsel for the Duke of Cambridge contended (1) that the personal statute now in question was universally valid ; (2) that the foreign deliverance by the family had the effect of a satisfactory proof of the incapacity of Duke Charles to manage his own property. On the other side, it was answered—(1.) Foreign judgments are of no effect in France. (2.) It did not follow from the 3rd Article of the Code Civil that the *status* and legal capacity of foreigners were to be determined by the law of their domicile ; on the contrary, another rule was recognised if, as in the present case, the foreign law was at variance with the general principles of French legislation, in respect that the forms prescribed by the Code Civil for procedure in interdiction, so as to avoid abuses, had not been observed. (3.) The whole proceeding had a mere political object—to prevent Duke Charles from entering on possession of his dominions, and therefore, like a political statute declaring emigrants to be civilly dead, could not be enforced in a foreign country.

The Tribunal of the Seine adopted the reasoning of Duke Charles's counsel, and the Court of Paris affirmed the judgment on 16th January, 1836, because the question was as to a political rule which had no operation in a foreign country. Cf. Sirey, 36, 2, pp. 70-78 ; Gand, No. 512.

capacity till redargued. But a foreign interdiction, even when properly vouched here, can hardly have any effect in this country till publication according to the forms of Scots law.”—Fraser, “Parent and Child,” p. 588. The cases in which English and foreign courts have exercised their jurisdiction in the interdiction of foreigners resident but not domiciled in the territory of the court, or in the administration of their affairs in case of lunacy, are noted below, *note on § 106.*]

#### (10.) “SPECIAL” INCAPACITIES.

##### § 55.

We have already attempted to show that cases of this kind are not to be determined by the *lex domicilii* of the person, but by the law to which the transaction in question is otherwise subject. To establish this theory more firmly, we shall examine the opinions of the authorities upon the most important questions of this class, but first we must lay stress upon the following limitation of the theory itself.

Although there is no real incapacity to act in any of the cases of this class, yet we must admit that the provisions of law concerned were enacted to ensure to particular persons a protection against imposition. This protection might, no doubt, be extended to all persons trading in the country, but in the case of persons who had a mere temporary residence there, it would obviously fall far short of attaining its purpose, and complicate in the highest degree the legal relations of these persons, who would find themselves to their own prejudice at one time subject to these restrictions, and at another free from them. For these reasons the rules of law, by which particular classes of persons are excluded from various legal acts, cannot be extended to foreigners, who are capable of executing these acts by the laws of their own country. We may add this further reason. The State to which these foreigners as regards their personality permanently belong, does not regard these protective restrictions as necessary ; still less can a foreign State,<sup>1</sup> which has no such

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<sup>1</sup> The following authors expressly pronounce in favour of the universal validity of the *lex domicilii* in questions of “special” incapacity :—Bouhier,



permanent care for foreigners, hold itself to be in a position to apply such protective legislation to them.<sup>2</sup>

(1.) As regards the limitations put upon women, and specially upon wives, in Roman law by the *S. Cons. Velleianum*, the "*Authentica si qua mulier*,"<sup>3</sup> the suretyship of a woman is, as a rule null, unless a particular form, viz., the execution of a public deed subscribed by three witnesses, be observed; besides that, it may be defeated by pleading the *S. Cons. Velleianum* as an exception; and in all cases, finally, the suretyship of a wife undertaken for her husband is null. In practice, however, this is so far modified that a cautionary obligation, which was undertaken or ratified on oath by a woman, after she had been instructed by a person learned in the law as to its consequences (and, in the case of a married woman undertaking such an obligation for her husband in his absence), was held valid.<sup>4</sup> According to the Roman law of modern times the matter is reduced to this,—since a woman by observing the forms introduced by practice and the Canon Law,

cap. 22, No. 131; Thöl., § 78; Savigny, § 364; Unger, p. 163; Demangeat, i. p. 204, note A; Foelix approves (i. p. 43) of the restriction of the term *statut personnel* to rules of law that affect the whole status of a person, but thereafter he proceeds in a way very inconsistent with this. Cf. Demangeat, *ut supra*.) Against the universal validity of the *lex domicilii*:—Pardessus, No. 1483; Gand, No. 295, *ad fin.*; Massé, p. 81, No. 164; Wheaton, § 85, p. 118.

From the great variety of views it follows that there is no general law of custom, and therefore logical grounds only can determine the question.

<sup>2</sup> Savigny's assertion, however, that the protective measures of each law-giver are always limited in their effects to his own subjects, § 364 (Guthrie, p. 164), goes too far. Cf. what is said *infra*, § 106, as to provisional curatories.

<sup>3</sup> There are special declarations as to the suretyship of women by Duplessis, Consult. 26, Œuvres, ii. p. 156 (he is for the universal validity of the *lex domicilii*); Bouhier, cap. 27, Nos. 5, 6; Boullenois, i. p. 187; Seuffert, Comm. i. p. 248, note 42; Walter, § 45; Thöl., § 85, note 7; Foelix, i. p. 204, and note thereon by Demangeat (as the latter remarks, Foelix's argument is inconsistent). It may be observed that many of the older writers, such as Bouhier, confuse the *Senatus Consultum Velleianum* with entirely different restrictions of German law upon the capacity of a wife.

<sup>4</sup> Cf. Puchta, Pandect, § 407. The Hanoverian statute of 28th Dec. 1821, for instance, requires for the execution of the cautionary obligation upon oath, that the woman should be instructed by the court, and that the obligation should be published in the minutes of the court.

can always become surety,—that special protective forms exist for women with reference to the assumption of cautionary obligations. If, then, any recognition at all is to be given to the rule, "*Locus regit actum*," a cautionary obligation undertaken without the protective forms must be held to be valid, if the woman had the power to become surety without them at the place where it was undertaken, and that too in spite of the assumption that all "special" incapacities are to be determined in accordance with the *lex domicilii*. Conversely, a cautionary obligation, which a woman is by the law of her domicile capable of undertaking, is not invalid, although these provisions of the Roman law are in force by the *lex loci actus*. Thus, for instance, a woman domiciled in dominions where Roman law is the common law, can undertake a valid obligation of this kind, where the Common Code of Austria,<sup>5</sup> or the Code Civil<sup>6</sup> is recognised, and the cautionary obligation of a woman domiciled in France or Austria is not invalid, if she becomes surety without special instruction as to the law, or ratification upon oath, in any country where the *S. Cons. Velleianum* and the "*Authentica si qua mulier*" are in force as part of the common law of the land.<sup>7</sup>

(2.) By Roman law (*S. Cons. Macedonianum*), the obligations incurred by persons still under paternal power by receipt of a loan are, as a rule, of no effect.<sup>8</sup> We cannot here

<sup>5</sup> § 1349.

<sup>6</sup> The Code Civil has tacitly removed the provisions of the Roman law.

<sup>7</sup> The decision of the *Cour Royale de Paris* of 15th March 1831 (Sirey, 33, i. p. 665), condemned by Fœlix, but affirmed by the Court of Cassation, by which the cautionary obligation of a Spanish woman, who had as surety for her husband disposed in security her real estate in France, was declared valid, is according to our view right in its result, but not upon the grounds taken by the *Cour Royale*. These were—1st, Because the property hypothecated was situated in France, and therefore the personal capacity of the female pursuer to incur obligations, and the effect of the obligations incurred by her (which she maintained to be null) must be determined by French law; 2nd, Because contracts and obligations which had been made and undertaken in France, and for the performance of which a party was entitled to sue in a French court, could be subject to no other law than that of France.

<sup>8</sup> This limitation upon children in family plainly does not belong to the class of cases of incapacity to act. If it were so, how would it be possible that a demand for restitution by a minor creditor should prevail against a plea upon the *Senatus Consultum* (S. 11, § 7; L. 34; D. de minor, 4, 4), or that there

appeal to any such ground as was urged with reference to the cautionary obligations of women, that by modern law the act becomes valid if certain forms are observed. Besides the general grounds already adduced, we have the following argument in favour of the opinion we have adopted. Even by the provisions of the Roman law if the lender did not know that the borrower was under paternal power, and had a reasonable ground for his ignorance, the *S. Cons. Macedonianum* could not be pleaded. According to the meaning and the spirit of the whole enactment, this must be extended to the case of the son who is in a foreign country, the inhabitants of which are not required to know our laws, and, looking to their own law, have not the possibility of such a plea before their eyes.<sup>9</sup>

An objection to our view might be raised upon the ground that the inhabitants of a country where the *Senatus Consultum* is in force would only have to take a journey into some other country where it is not recognised in order to escape its provisions. But although we have laid it down that the *S. Cons. Macedonianum* is not to be applied to every case in accordance with the *lex domicilii*, we do not mean to say that the validity of the loan is to be determined by the law of the place where it is made. What we have said is that the competency of pleading the *Senatus Consultum* will be determined by the same law as will regulate the validity of the loan in other respects; and that law, in the case supposed of a transaction *in fraudem legis* will be, as we shall show in connection with the law of obligations, just the law of the domicile of the contracting parties.<sup>10</sup>

Here, too, as in the case of the *S. Cons. Velleianum*, the validity of the loan can be maintained if it is made in conformity with the law recognised at the place of the domicile of the debtor.<sup>11</sup> A son under paternal power, therefore,

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should be no *condictio* of the money paid back by the receiver? (L. 14; D. de reb cred., 12, 1.)

<sup>9</sup> L. 3, § 1; D. ad *S. Cons. Macedonianum*, 14, 6.

<sup>10</sup> Cf. *infra*, § 66.

<sup>11</sup> Bouhier, cap. 27, No. 3; Walter, § 45; Thöl., § 85, note 7; Savigny, § 364; Guthrie, p. 158, pronounce for the universal validity of the *lex domicilii* in reference to the *S. Cons. Macedonianum*.

who has his domicile in Hamburg,<sup>12</sup> may validly incur an obligation by receiving a loan in a country where the common law of Rome is recognised.<sup>13</sup>

The same principles that determined the validity of the *exceptio S. Ci. Macedoniani* will find application to analogous cases—e.g., the invalidity which particular systems attribute to loans made to members of particular classes of persons.

(3.) By many particular systems it is provided, quite apart from the essentials of general capacity, and from the capacity to undertake obligations under contract,<sup>14</sup> that certain classes of persons shall not have the power of binding themselves by bills, or that certain classes alone shall have this capacity.<sup>15</sup>

A large division of the authorities on the subject has declared itself to be opposed to the general application of such rules, although they may rest upon the *lex domicilii*, and asserts the validity of an obligation depending on a bill, even in the face of such declaration of incapacity, if by the law of the place where the obligation was undertaken the same would have been valid.<sup>16</sup>

<sup>12</sup> The laws of Hamburg know nothing of the *exceptio S. Ci. Macedoniani* (Baumeister's *Hamburgisches Privatr.*, ii. p. 51).

<sup>13</sup> The question how far the father is bound by the acts of the child still under his power does not belong to this subject, but to the law of the family.

<sup>14</sup> Cf. *Allgem. Deutsche Wechselordnung*, Art. 1.

<sup>15</sup> E.g., officials are incapacitated, or only merchants, manorial land-owners, and farmers of State lands, or any other persons who have the special power given to them, are capable of binding themselves by bills. Cf., for instance, the provisions of the Prussian law, ii. 8, §§ 715-47, removed by the *Allgem. Deutsche Wechselordnung*, 1st Feb. 1849.

<sup>16</sup> Günther, p. 741; Massé, No. 64; Pardessus, No. 1413; Oppenheim, p. 404; Liebe. *Allgem. D. W. E.*, p. 226. We might name also all the authors who will not decide the "special" incapacities according to the *lex domicilii*. It need not be said that, according to the theory of the English and American practice, the *lex domicilii* does not rule. Savigny, § 364, Guthrie, p. 159, pronounces for the rule of the *lex domicilii*. Schäffner, p. 120, demands that the obligant should be capable of acting by the law of the place of the transaction, as well as by that of his domicile. This is a result of the principle laid down by Schäffner, which we have clearly refuted, that the laws of a place where a legal relation comes into existence are to be applied. Schäffner cannot, however, support himself by reference to the Prussian A. L. R.; for the subject discussed in the citation he gives is the form of the bill. (See Savigny, § 364, note c.)

There are weighty practical considerations to recommend this course. It seems to be intolerable in the interests of commerce that a man who has bound himself by a bill, in a country where all may do so, should be able to avoid the liability which he has thus undertaken by making an appeal to some quite exceptional provision which is to be found in the statute book that is recognised in his own country.<sup>17</sup>

From the fact that the capacity to contract an obligation by a bill is not always to be determined by the *lex domicilii* of the person undertaking it, it is not a necessary consequence that it is always to be settled by the law of the place where the obligation was undertaken. The capacity is rather to be determined by the laws that regulate the validity of the bill in other respects, since the rule "*Locus regit actum*" is not to be extended in all its force to affect the substance of contracts,<sup>18</sup> and the question whether a person can bind himself by a bill cannot be considered to be a mere question of form, according to the definition we have given of the form of a legal transaction.<sup>19</sup> (The limitations that are recognised at the place of the inception of the transaction for the protection of the parties cannot be extended to the subjects of foreign States.)<sup>20</sup>

The General Ordinance upon Bills for Germany (Allgem. D. W. O.), art. 84, coincides with this result.<sup>21</sup> It provides that: "The capacity of a foreigner to undertake obligations by bills shall be determined by the laws of the State to which he belongs. But a person who is, by the law of his own country, incapable of such obligations will bind himself by obligations upon bills in this country, in so far as he has the capacity of doing so by the laws of this country."

<sup>17</sup> Liebe; Orloff, Allgem. D. W. O., with papers of the conference held at Leipsic, art. 84.

<sup>18</sup> See *infra*, § 66.

<sup>19</sup> See *supra*, § 34.

<sup>20</sup> See *supra*, note 2.

<sup>21</sup> Cf. a judgment of the Supreme Court at Berlin, 21st November, 1840 (Decisions, vol. vi. p. 286), and a decree of the Royal Prussian Council of State, 16th January, 1834. Koch, on § 23 of the introduction to the Prussian A. L. R., is of another opinion.

According to the strict letter of this ordinance, we might understand the meaning to be, that not merely the special capacity to bind himself by bills, but the general condition of such capacity, viz., the capacity of the foreigner for legal acts of any kind, is to be determined by the law of this country, on the supposition that the special obligation by bill is by that law within his power. But although the motion in favour of the introduction of this clause was supported, according to the papers of the Conference on Art. 87, on grounds that would apply to the general question of capacity to engage in trade, as well as to this particular question of bills, it is plain from Art. 1. taken in connection with the fact that in Germany,—the country which was in the view of the authors of the ordinance,—the greatest diversity of law prevailed in the different States as to general capacity to act, that this was not the view intended to be taken by the legislator. By the expression “this country” the authors must have meant no single State of the German Confederation, but the united body, into which the new ordinance was to be introduced; and this combination of States has no general law as to what persons can bind themselves by contracts.<sup>22</sup> This article provides generally that obligations on bills, which have been undertaken by foreigners in the territory to which this ordinance applies, are to be interpreted, in so far as the question of capacity to undertake obligations by bills is concerned, according to the provisions of this ordinance. But in accordance with the view we have expressed, we must allow an exception in the case of two foreigners, natives of the same State, meeting in Germany upon such a bill transaction. This is simply explained by the consideration that such a case could but rarely be brought before a court in Germany, and that, as a rule, any process would proceed before the *forum domicilii* of either party.

There is nothing in this ordinance as to the case of a person who has not the capacity to bind himself by bills, domiciled in the territory to which the ordinance applies, but in other respects of full capacity for undertaking such an obligation abroad. There was no need of providing for this

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<sup>22</sup> Cf. the decisions reported by Borchardt on Art. 84.

case, since, by Art. 1, it is provided that no person shall have such special incapacity.<sup>23</sup>

*In Integrum Restitutio.*

§ 56.

*In integrum restitutio* is the reduction of a legal relation that has been entered upon, or the restoration of a relation that has been lost, by means of the decree of a judge upon considerations of equity and expediency. It belongs to no special division of our subject, and is rather a rule of universal application, for it may conceivably be applied in every institution known to private law, and even to many that belong to public law, according to the provisions that may be laid down by the law of each territory. The position we have assigned to it at the close of the discussion on the law of persons is justified in this way, that there is no room in a treatise on private international law for what is called a "general chapter," such as we find in the text books of particular territorial laws; the purely logical development of legal ideas, which supplies the material for such a chapter, cannot from its nature be made the subject of a work upon the conflict of laws; while this *in integrum restitutio*, just because it may be found in connection with most relations of private law, is most aptly treated at the very beginning of the system.

The special characteristic of this restitution is, that the judgment of the court, instead of making a declaration as to a legal relation already in existence, or what is to be assumed as in existence by the representations of parties,—the ordinary case in a civil suit,—here deliberately and consciously reduces a legal relation that exists, or restores one that has been lost.<sup>1</sup> We might, by reversing the considerations which in ordinary cases of civil suits exclude the application of the *lex fori* because of the end that is in view<sup>2</sup> (setting aside the

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<sup>23</sup> The question of capacity to bind oneself by bill is not to be confounded with the question whether summary diligence may be done upon a bill against a particular person, or a special process is appropriate.

<sup>1</sup> Savigny, Syst. vii. p. 100.

<sup>2</sup> Cf. *supra*, § 44, p. 146.

class of suits which the court holds to be immoral or indecent), hold that the *lex fori* is applicable in all cases of restitution; and some authors do in fact take this view.<sup>3</sup> But although restitution has for its object to re-establish a legal relation that has been lost, or to reduce one that exists, it does both of these things upon grounds which were present at the time when that relation originated or was lost; in other words, the competency of restitution implies an imperfect invalidity in the origin or extinction of the legal relation which is concerned,<sup>4</sup> and the end in view is to keep alive the opposite state of legal relation, which other rules of law justify, by aid, first, of the special proviso that the person who desires to avail himself of the invalidity in question shall have to appeal to the judge, next, by the possibility of renouncing the legal remedy and allowing prescription to run upon that renunciation, and lastly, by permitting the judge to pronounce a broad judgment, not hampered by any particular narrow rules of law, in all such cases as it shall appear to him to be for the interest, and in conformity with the requirements of legal intercourse to do so. As, therefore, there is no place for the application of the *lex fori* in questions involving substantial legal rights, the result is that this *in integrum restitutio* falls under the same local law as that to which the legal relation affected by the proposed restitution belongs. This is the view which most authorities take. The result of this is, that restitution against the loss of a real right in immoveable property is determined by the *lex rei sitæ*,<sup>5</sup> against the consequences of a binding contract by the laws to which this contract is subject for other purposes,<sup>6</sup> against the prescription of a suit by the laws by which

<sup>3</sup> Walter. D. Privatr., § 44; Holzschuher i. p. 78.

<sup>4</sup> See the resolution of the Supreme Court of Berlin on 14th February, 1842. (Dec. 7, p. 323) which gives expression to this theory in reference to the applicability of new legislation as to restitution.

<sup>5</sup> So P. Voet, 9, 2; J. Voet, in Dig. 4, 1, § 29.

<sup>6</sup> P. Voet. l.c., J. Voet. l.c.; Hert., iv. 66; Henr. de Cocceji, vii. 9; Bartolus, in L. 1, C. de S. Trin., No. 19; Bald. Ubald. L. 1, C. de L. Trin., No. 94; Baldus Perus, de statutis Vo. Territorium, § 1; Christianæus, Decis., vol. i. drois, 283; Burge, ii. p. 844; Savigny, § 374; Guthrie, p. 247; Mittermaier, Arch. für civ. Praxis, 13, p. 301.



it is itself to be decided, and against delays of process<sup>7</sup> and judicial sentences by the law of the place where the process is proceeding.

Many writers, however, make an exception in regard to the restitution of minors. They hold that to be merely a special mode of the operation of incapacity to act, and therefore they determine it according to the *lex domicilii* of him who seeks the restitution.<sup>8</sup> But although the restitution which is ensured for minors may, as a matter of fact, have consequences resembling those of incapacity to act, and although in classical Roman law it served, as a matter of fact, as a substitute for incapacity, so as to protect them against prejudicial transactions,<sup>9</sup> yet in a juristic sense they are quite distinct from each other, just as much as a penal statute against persons who take a dishonest advantage of a minor is distinct from a statute prescribing the incapacity of minors.<sup>10</sup> Such a penal statute has a common object with the other; but it follows necessarily from the difference of the path by which the object is reached, that there can be no question in such a case of applying to both the *lex domicilii* of the minor.

At the same time the following modifications of the general rule we have expounded must be recognised as applicable to the restitution of minors in conformity with the *lex domicilii*.

(1.) The restitution of minors in modern law,<sup>11</sup> where they have no capacity to act, rests upon the ground that because of their minority they are not fit to attend to their own affairs, and that they are from their minority under guardianship; but whether this latter fact is true or not depends, as we have seen, upon the *lex domicilii*, and so, therefore, must the further question whether a person in a question of restitution is to be treated as a minor.<sup>12</sup>

<sup>7</sup> The older authors say the laws of the place are to be applied in this case, *ubi contracta est mora (negligentia)*; cf. Bartolus, P. Voet, J. Voet *ut cit. supra*.

<sup>8</sup> So Boullenois, ii. p. 469; Böhler, cap. 25, Nos. 62-66; Merlin, Rép. Vo. Majorité, § 5; Decision of the Supreme Court at Berlin, on 25th March, 1833 (Simon & Strampff, i. p. 279).

<sup>9</sup> Savigny, § 365; Guthrie, p. 168; vii. p. 146.

<sup>10</sup> So the *Lex Plætoria* in older Roman law. See Savigny, l.c.

<sup>11</sup> Otherwise by the older Roman law.

<sup>12</sup> Cf. J. Voet, l.c.

(2.) The restitution of minors rests upon a special protection which is extended to them. That, however, can only take place where it is so extended by the *lex domicilii* of the minor. If a foreign State proposed to afford such protection to a minor against the law of his own State, no benefit would accrue to the minor,<sup>13</sup> but his credit would much more probably be shaken, and his position as a person of property thrown into confusion. No restitution, therefore, can be afforded by a foreign court where it is excluded on the head of minority by the *lex domicilii*.<sup>14</sup> This is, perhaps, unimportant, since, if restitution of minors is not recognised by the *lex domicilii*, it may be assumed that the constitution of the administration by curators is such as to render this legal remedy unnecessary or even prejudicial.<sup>15</sup>

### III. LAW OF THINGS.

#### A. GENERAL PRINCIPLES.

#### § 57.

No rule of private international law is less disputed than that which holds that real rights are to be determined by the law of the place where the property lies.<sup>1</sup>

<sup>13</sup> See the exposition given above in reference to the incapacity of minors.

<sup>14</sup> Huber, § 12; Ricci. p. 522. The Supreme Court of Appeal at Celle laid down, in a judgment of 1782, that a native of Magdeburg who sought *restitutio in integrum* from the Court of Hanover must have suffered the lesion complained of before his twenty-first year (in accordance with the law of his domicile). V. Bülow and Hagemann, Prakt. Erört. i. p. 150 (cf. Ramdohr, Jurist. Erfahrungen, iii. p. 992). (In the older provinces of Hanover Roman law is the common law).

<sup>15</sup> Wächter, ii. pp. 174-179, is of the opinion that the judge can only give the minor restitution in so far as the laws of the judge permit. This argument, however, would necessitate the application of the *lex fori*, not here only, but in every other case.

<sup>1</sup> Argentræus, No. 2; Bartolus, in L i. C. de S. T. No. 26-32; Mevius, in Jus. Lub. Proleg. qu. 6, § 10; P. Voet, de Statut. Lib. ix. c. 1, No. 2; Burgundus iv. 12; Bouhier, chap. 29, No. 2; Vattel, ii. chap. 8, §§ 103-110; Merlin, Rép. Vo. Biens, § 20; Vo. Loi, § 5; Eichhorn, § 36; Glück, Comm. § 76; Seuffert, Comm. i. pp. 246, 247; Göschen, i. p. 112; Mittermaier, i. § 32; Günther, pp. 736, 737; Mühlenbruch, i. § 72; Kierulff, pp. 80, 81; Massé, ii. p. 92; Reyscher, i. § 82; Philipps, i. p. 189; Burge, i.

We cannot, however, say that this concurrence of opinions extends to the grounds upon which the law of things is shown to be determined by the *lex rei sitæ*. Most of the authorities assume that these things are subject to the *lex rei sitæ* as a law of nature, without troubling themselves to inquire further. Others, again, infer from the conception of the sovereignty of every State that none will permit the application of foreign laws to things that are situated in their territory.<sup>2</sup> Savigny finds ground for the application of the *lex rei sitæ* by assuming a voluntary subjection of themselves thereto on the part of all who claim rights in these things.<sup>3</sup> Wächter and Thöl deduce the application of the *lex rei sitæ* from the will of the legislature, but have no further explanation to give why the will of the legislature should be what they say it is.

In details the views of different authors are still more various. A favourite subject for debate is, whether and how far there is a difference in the proper treatment of moveables and immoveables. In the meantime, we will overlook these details, and give our attention to the law of things in general.

The first argument—viz., that which holds the treatment of the law of things according to the *lex rei sitæ* to be some-

p. 29; Fœlix, i. p. 115-6; Schöffner, p. 65 and p. 82; Wächter, ii. pp. 99, 200; Savigny, § 366; Gerber, § 32; Beseler, i. pp. 152, 153; Story, §§ 424 *et seq.*, and §§ 374 *et seq.*; Thöl, § 84; Unger, p. 173.

<sup>2</sup> Merlin, Rép. Loi, § 5, cites the words of Portalis :—"La souveraineté est un droit à la fois réel et personnel. Conséquemment aucune partie du territoire ne peut être soustraite à l'administration du souverain comme aucune personne habitant le territoire ne peut être soustraite à sa surveillance et à son autorité. La souveraineté est indivisible. Elle cesserait de l'être si les portions d'une même territoire pouvaient être régies par des lois qui n'emaneraient pas du même souverain." Cf. Schöffner, p. 65: "The foreigner who wishes to exercise rights over immoveable property in this country, enters the sphere of this country's law by that very fact. He makes claim to subjects which, by their very nature, can be under no other law than that of the State whose corporeal basis they do to some extent constitute."

<sup>3</sup> § 366, *ad init.*; Guthrie, p. 174: "For since the object of these rights in things is cognisable by the senses, and occupies a determinate space, the locality in space in which they are situated is the seat of the legal relation whose object they are to be. Whoever wishes to acquire, possess, or exercise rights over a thing, betakes himself for this end to their seat, and voluntarily subjects himself, for this particular legal relation, to the local law that prevails in that territory."

thing in the laws of nature—is found, on further examination, to be devoid of all foundation. It seems rather to occur to one, on the first glance, that real rights in things should be determined by the *lex domicilii* of the owner or the possessor, and, failing that, by the law of the tribunal, as Pfeiffer has recently maintained.<sup>4</sup> The application of the *lex rei sitæ* cannot therefore be pronounced to be self-evident if, at the first glance, another view suggests itself. Just as little can we concur in the second reason assigned. The sovereignty of a State is just as strictly applicable to persons who are temporarily within its dominions, as to things which happen to be there. There is therefore no speciality applicable to the law of things to be found there; and, in any event, the result of the abstract principle of sovereignty, and the non-recognition of foreign laws, is the rule of the *lex fori*, and not that of the *lex rei sitæ*.

The voluntary subjection on which, according to Savigny, the application of the *lex rei sitæ* rests, is a *petitio principii*: on the one hand it must be shown that the laws recognised at the place where the thing is situated will suffer no interference with their supremacy over rights connected with these things, for otherwise a voluntary subjection to them would not ensure the application of the *lex rei sitæ*; and, on the other hand, if it is true as a matter of fact that anyone who wishes to exercise rights over a thing must betake himself to the place where it is situated, and may thereby be subjected to the laws of that country, it does not by any means follow that other States must recognise this subjection; if, for instance, a moveable thing be afterwards taken into the territory of another State, or if the question, who is the owner of a thing, should emerge incidentally in the course of a process in some other State as the foundation of a private right.

The last theory of the foundation of the rule, given by Wächter and Thöl, must no doubt be described as that theory which is sound in principle. But here, as in other cases, it is not enough to appeal to the intention of the lawgiver without assigning reasons for that intention.

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<sup>4</sup> Pp. 60, 61.

## § 58.

That a more accurate definition of the law of things shows that the *lex rei sitæ* is the only one that can possibly be applied is thus demonstrated.

The law of things is commonly defined as the doctrine of the legal dominion of persons over things. This is not quite accurate, since all laws must at bottom regulate legal relations among persons, and things cannot in themselves serve to form the correlative to persons in such relations: we only express the negative side of the legal relations that fall under the subject, by the proposition that if one who has the right to a thing deals with it somehow by virtue of that right, no legal relations arise, since it is at his command in the way in question.

The most important and the most difficult part of the doctrine of the law of things deals with the protection which he who has the right to a thing enjoys as against third parties who have no such right, and with the mode of determining, among several claimants of the right to a thing, to whom it in truth belongs. This positive side is expressed by describing the law of things as the doctrine of the legal relations which may arise from the actual<sup>1</sup> existence of a thing, and are necessarily conditioned by it.<sup>2</sup> But the existence of a

<sup>1</sup> According to this definition, the law of things includes the doctrine of possession. This might be justified on the ground that a possessory right is really a temporary right to the thing: one doctrine passes into the other at many points; and if considered closely, as may be seen from the ordinary definition of possession and of a right to a thing, the one cannot be thought of without the other. For the definition of property as a legal dominion can only be understood by tacitly taking with it the complementary notion of actual dominion; while the definition of possession as actual dominion requires the complement of legal dominion.} [[But an action for the price of heritage may be brought at the domicile of the debtor (Girard Delormé v. Bergeron, Trib. civ. de la Seine, 12th November, 1874.)]]

<sup>2</sup> From the fact that the existence of this right is conditioned by the thing, and, therefore, ceases with it, we get the distinction between the law of things and the other legal relations which merely have their origin in the actual existence of things—*e.g.*, the obligation of the possessor of a thing to answer for its loss. This is a relation of obligation merely *quasi ex contractu* or *ex delicto*. As, however, certain legal relations may be constituted by special convention among those who have right to a thing and through the existence of that thing, it is indispensable to add the word “necessarily.”

thing does not in itself found any legal relation ;<sup>3</sup> it is necessary that it should become the subject of legal commerce, and this occurs when some person actually makes himself master of it.<sup>4</sup> All the modes of acquiring rights in things originally — occupation, specification, the combination of one thing with another, and prescription — rest upon an actual dealing with the thing itself, and all derivative as well as original modes of acquiring rights in things agree in this, that by them is determined the protection to be afforded to him who is in right of them against the claims of third parties.

There must, however, necessarily be a limit to the protection which such a person enjoys, and beyond that limit persons who have no right in the thing will, even in a question with him who had the original right in it, to a certain extent, be protected by law, either temporarily or permanently, in actual dealings with the thing in question, or operations upon it. In this way, for instance, a person who has no right at all in a thing, may by actual appropriation and prescription rob the former owner of his rights, or at least be protected to a certain extent in his possession of the thing as against the former owner. If, then, the object of the law of things be to discuss the legal relations which are necessarily conditioned by the actual existence of a thing, and arise from the circumstance that any person's dealings with it must be by means of actual interference with it ; and, further, if it is impossible actually so to interfere with a thing except upon the spot where that thing for the moment happens to be, we have then this result for the subject under discussion, that the determination of the right in that thing must be carried out in

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<sup>3</sup> No private rights exist in things which have not yet been occupied.

<sup>4</sup> It may be objected that it does not require the act of man to originate a right in a thing, but that, as in the case of adhesion, it may be done by an operation of nature. But it is no proposition of law to declare that there can not be any separate right of property in a thing which ceases to have an independent existence, and that natural accession increases the property of the owner of the principal thing ; it is merely a necessary rule of logic, and therefore obtains in every legal system, just in the same way as the proposition that the air and the water, which are worked up by plants into fibres, belong to the owner of the plants, from which latter proposition it follows that the owner has right also to their fruit.

accordance with the laws of the land where it happened to be at the time when it was dealt with in such a way that a particular real right in it was acquired or lost. The law of the place of the domicile of either of the parties cannot decide, because the object is to determine the legal relations of all the persons who have been brought into any kind of relation with the thing, and therefore no weight can be given to the fact of domicile. In the same way, if the place of the transaction which affects the thing, and the place of the thing itself do not coincide; if, that is to say, a bargain about the thing be made without any actual contact with it, it is not the law of the place of the bargain that will rule: for this reason, that if the right said to have been created by this contract comes to be questioned as a real right, and therefore to be tried with a third party, the discussion and decision will both turn upon the question whether, and if so, what effect is to be given to some actual dealings with the thing by a third person after the conclusion of the contract: for instance, it is settled that if there be a good disposition of the thing in security by means of an informal contract, then a subsequent tradition of it will not give the new owner and possessor those rights which they would have acquired apart from the disposition in security. The law that is recognised at the seat of the court which is competent for decision of any question, cannot in any view be taken as decisive: the question is in every case, in so far as the process deals with real rights, and not with mere matters of penalties relating to the process—*e.g.*, the obligations incumbent on one who has fraudulently conducted his suit—whether at some former point of time the one person had a right as against the other: now, if the law of the place of the court were to decide, that right would not be declared but a new one would be created. This, however, is at variance with the object of all civil process.<sup>5</sup> The belief that any other law than the *lex fori* or the *lex rei sitæ* can decide, rests upon a tacit assumption of that which is the first thing to be determined and settled. It is assumed that the person on whose domicile stress is to be laid has already rights in

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<sup>5</sup> See *supra*, p. 58.

the thing, be these mere rights of possession, or that some particular transaction gives or transfers right in the thing, and the question, as to what law is to rule a legal relation, is made dependent upon the previous existence of another relation of private law, or upon the belief that a transaction with reference to the thing has had some effects by private law, while as yet, in so far as international law is concerned, we are not in a position to postulate the existence of any definite right, but merely to assume facts and circumstances : such, indeed, are the place of the transaction, or of the tribunal, or of the thing, or any such circumstances as, like domicile, belong to international law or, if we take the case of the different provinces of one State, to municipal law.

If it is demonstrated that it is the wish of the legislature that its provisions as to real property should comprehend all things that at any time are found in its territory, it would, no doubt, be conceivable that the State, while it claimed this right for itself, should refuse the same right to other States, at least in relation to things belonging to its own subjects, and should therefore proclaim that rights in things which belonged to one of its subjects should, even in a foreign territory, be lost in accordance with its own laws, and that the rights of others to those things should only be recognised if they were acquired in conformity with the laws of the domicile of these persons. This would, however, be a denial of the sovereignty of the foreign State : for it is impossible to dispute what necessarily follows from the nature of legislative power, and what is claimed by our State upon this very ground, when it is claimed by another State within the limits of its own authority. Civilised States permit intercourse with each other, and, therefore, also permit moveables to be brought from one territory into another, and further, mutually concede that these things shall be subject to the system of law of the country into which they may happen to have been brought. What monstrous uncertainty would be created for trade, if one State were not obliged to recognise the acquisition and loss of real rights in the territory of another State in accordance with their laws, may be imagined. But all the more impossible is it to coincide with the view Savigny takes of a voluntary subjection of the individuals



concerned : if strictly taken up, this would lead to the result, that in any case the application of the *lex rei sitæ* could not be maintained, if the thing in question were taken into the territory of another lawgiver against the will of the possessor.<sup>6 7</sup>

The attempt to determine rights in things according to the laws recognised by the law of the domicile of the person, has been shown to be impracticable, as Wächter<sup>8</sup> and Savigny<sup>9</sup> have already demonstrated. While the whole object is to show who has a particular right in a thing, it is assumed that some one already has either one right or another, but, although the one or the other real right—*e.g.*, property or possession—is always laid down as being the leading right, and that which is to settle the question, we always fail to find a principle for decision when two persons come to be in dispute about that very right.

### § 59.

It must, therefore, appear all the more surprising that far the larger number of the older authors, and even many moderns, especially English and French, take a distinction in this respect between moveables and immoveables, and lay down a rule, that while rights in immoveable property are to be determined by the *lex rei sitæ*, rights in moveables are to be determined by the *lex domicilii* of a person.<sup>1</sup> Most of them

<sup>6</sup> In Riccius, p. 592, we find this strange theory which destroys the security of all commerce, and cannot be reconciled with the conception of territorial sovereignty.

<sup>7</sup> In times of war, the belligerent powers recognise that a ship which has actually fallen into the enemy's hands belongs to him, and is subject to the law of his country, and if it should be re-captured, the right of the original owner does not revive, but the prize falls to the captor. Grotius, iii. c. 6, § 3, No. 1 ; Massé, i. No. 417 ; Vattel, iii. § 196. The English Government alone, in such circumstances, gives the ship back to the former owner.

<sup>8</sup> i. p. 293.

<sup>9</sup> § 366 ; Guthrie, p. 175.

<sup>1</sup> Barthol. de Salic. in L. 1. C. de. S. Trin. No. 14. Argentæus, No. 31 ; Burgundus, i. 41, 42 ; iv. 26. Rodenburg, ii. p. 1, c. 2, § 1 ; iii. p. 1, c. 4, § 1 ; ii. p. 1, c. 5, § 16. Mevius, Proleg. qu. 6, § 23. P. Voet, iv. 2, § 2 ; ix. 2, § 8 ; x. § 2. Cocceji, De fund. viii. 4. Jo. a. Sande, Decis. iv. tit. 8, defin. 7. Matthæus, i. 21, no. 35, 36. Christianæus, vol. i. ; Decis. iii. 5, No. 1 ; Gaill, ii. obs. 124, No. 17. Witzendorf, de statut., xv. No. 11 ; xxiv.

do not expressly say to what person they refer, but they mean the person of the owner.<sup>2</sup> The view that holds the domicile of the possessor as regulative,—a view which is more easily carried out in practice, because the rules for determining the possession of a thing are more generally alike among different peoples than those which determine property,—is rare.<sup>3</sup>

The reason assigned for this view is, that moveables must be held in a legal sense, to be at the place where the person has his domicile,<sup>4</sup> because it is quite accidental where they may be, and it is in the absolute power of the owner to take them from one place to another. (According to the theory of *statuta personalia realia* and *mixta*, it was assumed that the laws which dealt with rights in things were *statuta realia*, but as the laws recognised at the domicile of the owner were said to rule the case of rights in things, these laws were, for shortness, described as *statuta personalia* when they referred to moveable things.)<sup>5</sup> But even putting out of sight the impossibility of carrying out in practice the rule of determining rights in moveables according to the *lex domicilii* of one of the parties concerned, this ground cannot be considered as apposite, since the existence of a right is very often due to accident; while the provisions made by the owner or possessor for his property may be of little importance, since in the law of things the actings of third persons who, in a question with the good right of the owner, have no right at all in the thing, can often disturb or encroach upon the owner's rights.

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No. 6; Colerus, *proc. execut. i. c.* 3, No. 253. Chassenæus in *consuet. Burgund. Rubr. ix.* § 16. Boullenois, *i.* p. 121, p. 833. Bouhier, *cap.* 24, No. 177; *cap.* 25, No. 1. Pothier, *Des Choses*, § 2, No. 3 (in his posthumous works, *ii.* p. 650). Hofaker, *principia*, § 140. Danz. *i.* § 53, p. 178. Hommel. *Rhaps. vol. ii. obs.* 409, No. 4. Titius, *i. c.* 10, § 43. Oppenheim, p. 396. Thibaut, § 38. Schweppe. *Römisches Privatrecht*, *i.* p. 52. Maurenbrecher, *i.* § 144, *ad fin.* Mittermaier, § 31. Massé, p. 93. Mailher. de Chassat. No. 63. Fœlix, *i.* p. 125, § 61. Burge, *i.* p. 81. Story, § 374. Holzschuher, *i.* p. 63. Heffter, § 38, p. 73.

<sup>2</sup> Cf. Savigny, § 366; Guthrie, p. 175.

<sup>3</sup> Hauss, p. 26, 34; Story, § 383; and Kierulff specially declare themselves in favour of the rule of the law recognised at the domicile of the owner.

<sup>4</sup> The older writers say, "*Mobilia ossibus inhaerent*," or "*Mobilia personam sequuntur*," English and American authors and courts say, "Personal property has no locality."

<sup>5</sup> So for instance, Fœlix, *loc. cit.*

It is still less possible to lay stress upon the principle recently laid down, that the person acquires a power of attraction over the thing ;<sup>6</sup> by such means anything could be proved.<sup>7</sup>

If we enquire more closely what import the older authors mean to assign to the rule, we can scarcely find one instance adduced of a real right to a particular article as an illustration of the theory, although facts lay so near at hand. On the contrary, as a rule, they take the relations of the law of inheritance and of the property of married persons, cases in which the rule is applied in order to avoid the result that would ensue from the consistent determination of their problems by the *lex rei sitæ*—viz., that a different law of inheritance or of matrimonial rights might apply to each single moveable article that belonged to the estate. This result seemed so absurd and impracticable, that it was thought necessary to avoid it by the introduction of a special rule of law ; and, as in these two departments of law, no stress was put upon the cardinal point—viz., whether and to what extent the different legislatures looked upon the estate as a whole,<sup>8</sup> or upon each asset that belonged to it separately, and at the same time these departments were universally held to supply a separate class of rights in things, while the *lex rei sitæ* was declared to be supreme over rights in things as a general rule, the only way to extricate matters without a contradiction was to set up the fiction that moveables were to be held to be present at the domicile of the owner or the possessor without consideration of their actual situation. In these two categories the question that must inevitably arise in the application of any rule dealing with rights as to particular things, whether the domicile was the domicile of the owner or other person who had the real right or of the possessor,

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<sup>6</sup> Holzschuher, p. 63.

<sup>7</sup> Passages from the Roman law have been cited in proof of this, L. 32, D. de pign. 20 ; 1 L. 35, D. de hered. instit. xxviii. 5. These passages refer to the interpretation to testamentary settlements, and have nothing to do with a conflict of different laws. Cf. Wächter, i. p. 250-51, and *supra*, p. 13.

<sup>8</sup> Older German law treated succession in moveables as a universal succession, the theory of modern English law ; one who falls heir to the moveables is liable for the debts in so far as these are not expressly laid upon the landed property.

could not be raised. Since in any dispute as to inheritance or the property of married persons, all those who took part therein founded their rights upon a succession to the estate of one and the same person, or upon a right to represent one and the same person, it is only the domicile of this one person that can come into question; the suit as to the inheritance or the estate of the spouses will not touch the real rights of any other persons, apart from and independent of the rights of the deceased, or of either of the spouses. Some writers, who determine the capacity to act by the *lex rei sitæ*, use the rule for the purpose of confining their theory, which if applied to moveables would lead to results that could not be carried out in practice, to the power of disposing of immoveables.<sup>9</sup>

This is confirmed by the many exceptions taken by authors of foresight. Mevius points to the case of an arrestment laid upon a moveable as a case where it would not be possible to apply the law of the domicile of the person to whom the thing arrested belonged,<sup>10</sup> and J. Voet will only sanction the rule in the restricted sense of a practical regulation, and not of a legal principle, so that it would be necessary to inquire into the practicability of its application in every case.<sup>11</sup> Among the modern authors who defend the theory in general, Fœlix and Massé except from its operation the law of things in the narrow and proper sense,<sup>12</sup> and the judicial decisions, reported by Story,<sup>13</sup> expressly declare that the property in goods sold only passes to the buyer, if the method of transference be in conformity with the laws of the place where at the time of the transaction in question the goods as a matter of fact were, and in the same way the law as to pledge and *mora* connected with moveables is determined by the law of the *lex rei sitæ*. The reasons which require the

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<sup>9</sup> Cf. Unger, i. p. 156. The cases reported in §§ 3, 7, 9, *et seq* of Story, in which the rule "Personal property has no locality," was taken by American and English courts as the basis of their judgments, appear without exception to refer to cases of succession or of property of married persons.

<sup>10</sup> Proleg. qu. 4, § 27. If the rule were consistently carried out, arrestments, depending upon the fact of the owner being a foreigner, would be inconceivable, for no man is held to be a foreigner by the law of his domicile.

<sup>11</sup> Comm. ad. Dig. i. tit. 4, p. 2, No. 10-13.

<sup>12</sup> Massé, p. 96, No. 70; Fœlix, i. p. 134.

<sup>13</sup> §§ 385 *et seq*.

application of the *lex rei sitæ* in these cases, and exclude all regard to the *lex domicilii* of the owner as opposed to the general security of trade, could not in fact be better laid down than they were in a decided case reported by Story (388-389).<sup>14</sup> If, however, the opinions of the more approved authors as to the meaning of the rule "*mobilia personam sequuntur*" do not go the length of affirming that all real rights in individual moveable things must be determined by the law of the domicile of the person, we need not assume that the Legislatures that have expressly adopted the rule<sup>15</sup> mean to affirm this.

It is the purpose of these Legislatures to establish the rule only in the sense of a logical result from the nature of rights in moveable things, and not in any sense by which it might come into conflict with logical principles, and in any event to establish it in the sense in which the views of the day regarded it. We have already shown that these never considered the exclusive determination of the *lex domicilii* to be right or proper.<sup>16</sup>

Already a large number of modern writers have taken it as a principle that rights in moveables should be determined<sup>17</sup>

<sup>14</sup> Story seems to think that, if the *lex rei sitæ* were at the bottom of the acquisition and loss of real rights in moveables, rights vested in one country would be lost if the thing were subsequently brought into another country, and the mode of acquisition sanctioned in the one country did not correspond with that of the other. This is, however, by no means the case according to the theory of the text.

<sup>15</sup> *E.g.*, Preuss. A. L. R., Intro. §§ 28 *et seq.*; Oester. G. B., § 300.

<sup>16</sup> Unger thinks differently of the Austrian Code, but concedes that, in cases whose complications cannot be resolved by the principles therein assumed, the principle of the application of the *lex rei sitæ* as in the nature of things must be adopted. Koch, in his notes to the paragraphs of the Prussian A. L. R. cited, shows that they cannot be carried out in practice.

<sup>17</sup> Besides Savigny and Wächter, ii. p. 383; Reinhardt, p. 31; Göschen, i. p. 112; Mühlenbruch, § 72, ii. 1, p. 194; Philipps, p. 246; Beseler, i. p. 152; Schäffner, p. 82; Eichhorn, § 36; Thöl, § 84; Gerber, § 32, declare themselves opposed to the establishment of any general rule at all as to real rights in moveables. If Gerber proposes to find the principle of determination in the import of each legal relation, he should have explained how that is to be ascertained. This, however, he has not done. The ground which is assigned by Mühlenbruch for the view taken here proves nothing. See, on the other hand, Fœlix, i. p. 129.

by the *lex rei sitæ*, and some Legislatures<sup>18</sup> have expressly adhered to it.

### § 60.

Savigny thinks the following modifications of the general rule must be made. 1st, In the first place, says Savigny, (§ 366, Guthrie, p. 179), the position in locality of the moveable thing may be so indefinite and fluctuating as to exclude the possibility of knowing where that position is, and consequently what is the territory the local law of which applies, and therefore, too, the assumption of a voluntary subjection to that law; to this class belong a traveller's luggage or goods in transit. 2nd, A moveable article may also be so dedicated that it becomes attached to some permanent resting-place, as for instance the stocking of an estate or the furniture of a house. 3rd, Between these two opposite classes of moveables there lie many intermediate cases in the most various gradations. The general rule of the supremacy of the *lex rei sitæ* will be applied to real rights in things of the second class, as is admitted by many authors, who in other respects take the rule "*mobilia sequuntur personam*" as their principle.<sup>1</sup> With regard to the first class, to which belong the cases of a traveller with his baggage passing through several countries in one day in a mail coach or in a railway train, and that of a merchant despatching goods upon a long sea voyage, the *lex domicilii* will always rule. Savigny thinks it impossible to lay down a general rule for the intermediate class. It depends on circumstances whether the *lex domicilii* or *rei sitæ* is to rule; and it is not merely the longer or shorter

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<sup>18</sup> So the Codex Maximil. Bavaricus, P. 1, C. 2, § 17, and the 4th article of the Code of the Canton of Berne (Fœlix, p. 139). The *code civil* has an article which provides, "*Les immeubles même ceux possédés par des étrangers sont régis par la loi française.*" We cannot, however, deduce from that a tacit sanction of the rule "*mobilia personam sequuntur*" in the sense of an exclusive application of the *lex domicilii* to moveables, but merely infer that the application of the *lex rei sitæ* prescribed by the Code for immoveables is not to be extended to moveables, unless there are logical reasons to justify it. The judgments cited by Fœlix, p. 132, all refer to the law of succession, and do not, therefore, touch the view taken here.

<sup>1</sup> *E.g.* Mevius, Proleg. qu. 4, 20; Carpzov. Jurispr. for P. iii. const. 12, defin. 15; Story, § 382; Pothier, Des. Choses, § 1.

duration of the thing in one place that is to be considered, but also the nature of the legal category with the application of which we may be concerned. For example, a very short period will be sufficient to determine the question as to the appropriate form of alienation of a thing, *e.g.*, whether it shall be tradition or mere contract, to the effect of making the *lex rei sitæ* the rule, whereas, on the other hand, as Savigny remarks, prescription may be considered in another light.

The principle on which this distinction rests, is the theory of Savigny already mentioned, according to which the application of the *lex rei sitæ* results from a voluntary subjection of the persons concerned to it. Although there is no occasion to draw back on this account from the universal validity claimed for the *lex rei sitæ*, in order to allow the modifications of that rule (which Savigny himself says is the general rule) to have their operation, his remarks are, with the following limitations, true:—

1st, If the acquisition of a real right in a thing rests upon a voluntary transference on the part of the owner, or of any other person who may have the right to it, the intention of the party making the transference (apart from the other requirements of the law in cases of transference or grant) to make that transference or grant must be clear; and there may be a doubt as to this intention in case it should happen that the requirements for the constitution or transference of the right in question are different at the place of the domicile of the granter from those of the place at which the thing happens for the moment to be. If, then, as is assumed in the instance given in illustration by Savigny, of the traveller's luggage, or the cargo upon a voyage, the owner does not know where the thing is, or what the law of the place is, his intention cannot be ascertained if, in the transaction that is in question, the forms required by the *lex domicilii* of the owner or other person having right to the thing are not to be observed. As, however, the right in question cannot be transferred unless that intention exists, the alienation of the thing, although conceived in a form that is recognised as valid by the *lex rei sitæ* cannot receive effect. For instance, take the case that, by the law of the domicile of a merchant who sends a cargo of goods through

different countries, tradition is required to transfer property in moveables, but is not required by the law of the place which these goods at the moment of the contract happen to have reached upon their transit. It cannot be asserted, so long as tradition has not taken place, that there was any intention of transferring the property.<sup>2</sup>

It is, however, to be noted that, by international law, a ship upon the high seas is held to be a part of that territory whose flag it is entitled to carry; and that therefore, on this ground, if the owner has placed his goods upon a ship belonging to his own country, the *lex rei sitæ* and *domicilii* coincide until the ship has reached a port of some other country.<sup>3</sup> The length of time during which a thing remains in a particular place determines, therefore, the intention of the contracting parties, but does not rule the objective requirements of the transference or constitution of real rights.

2nd, In the case of a legal category which can only be applied to the permanent possession of a thing, it cannot from its very nature be applied to moveables which are only accidentally and temporarily in the territory to which that rule belongs; but, conversely, it must be applied to all such things as are ordinarily considered to be present in that territory, and are in some other country for a short time only—that is to say, to all moveables possessed by subjects of the State, in so far as the possessor has made no special dedication of them, whereby they are permanently attached to a foreign seat. The possessor has the actual dominion over the thing; and it can be of no importance, where the question is as to the effects of a permanent legal relation, that he has not as yet used the powers which he has in virtue of his dominion to bring the thing to his own domicile. In these cases the *lex domicilii* of the possessor must be held to rule, a result which is possible just because the question who is the possessor may be certainly determined without contradiction; and it is admitted for this reason also, that to determine this per-

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<sup>2</sup> A similar observation must be made in reference to the rule "*locus regit actum*," *supra*, p. 139.

<sup>3</sup> In this way are resolved the doubts expressed by Story, § 377 *ad fin*, and urged by him against the application of the *lex rei sitæ*, and the decision of the Supreme Court of Louisiana cited by him in § 391 is explained.



manent relation according to the laws of all those places where the thing may happen to be at any single moment of this long period, necessarily involves difficulties that cannot be unravelled. This is of special importance for questions of prescription in moveables, and the prescription, too, of actions directed to the delivery of particular articles. By the term possessor is to be understood he who actually determines the situation of the thing, and therefore, as a general rule, the legal possessor, since the custodier merely carries into effect the instructions of the legal owner. If anyone, without leave from the legal possessor or the owner, is exercising some right of use upon the thing, and for this purpose has it in his possession, he determines the place where the thing must be, and his domicile therefore supplies the legal rule.

### § 61.

We have again to remark that the rule, "*locus regit actum*," does not apply to the rules for the constitution and transference of real rights. That is the result of the proof we have already attempted to adduce for the universal validity of the *lex rei sitæ*.

But we have also the following grounds to support it. In the Middle Ages, to acquire landed estate in property or in feu was held equivalent to being received into the community or feudal union under whose authority that estate lay. This explains how, at first, such rights had to be transferred in presence of the community, and afterwards before the *judex rei sitæ*,<sup>1</sup> and how the application of the *lex loci actus* was excluded. Although this rule disappeared in many districts as the Roman law advanced, yet the rule of customary law, "*locus regit actum*," was never applied to real rights to landed estate.<sup>2</sup> The grounds upon which this exception depends are the very same as those which compel the re-

<sup>1</sup> Cf. Beseler, ii. p. 78.

<sup>2</sup> This, too, is undisputed. For instance, we may name the following authors who specially reject the rule, "*locus regit actum*," as regards the acquisition of landed property and other real rights in the soil:—Argentæus, No. 3; P. Voet, c. i. § 9, No. 2; Alef, No. 44; Cocceji. vii. 14; Ziegler, Dicastice, Cond. 15, No. 12; Boullenois, i. pp. 501-503; Reinhardt, i. 1, p. 31; Mittermaier, § 32; Burge, ii. pp. 843-871; Wächter, ii. p. 383;

cognition of the *lex loci actus* for other acts by the force of an universal law of custom. If it be the case that this rule is advocated as applicable to contracts or testamentary dispositions, because it would not unfrequently be impracticable to observe any other forms than those recognised at the place of the transaction, and without such a rule it would be necessary to observe the forms prescribed by more than one system of legislation, we may lay down exactly the converse for the transference of real rights in landed property. All enactments which, in order to protect the rights of landed proprietors, have introduced forms of execution, would be illusory if it were possible to escape from these forms for the acquisition of real rights by a journey into another country. It is the public interest which would suffer by such an elusion of these forms, and not the individual, as in the case of obligatory contracts.<sup>3</sup>

Just as little can the rule "*locus regit actum*" be applied to the transference of real rights in moveables.<sup>4</sup> We could

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Story, §§ 435, 363; Savigny, § 381; Guthrie, p. 320; Unger, p. 176. Although Story, in the passages cited by him, § 439, finds a large number of authors who take the opposite view, the reason of that is that these authors—viz., Rodenburg, tit. 2, c. 3; Vinnius ad Instit. 2, 10, § 14, No. 5; Molinaeus, Consilia, 53, § 9; Huberus. i. tit. 3, § 15; J. Voet, ad Dig. i. tit. 4, p. 2, §§ 13, 15—discuss the validity of a testament executed according to the forms of the *lex loci actus* to affect immoveables situated elsewhere; and that this question must, no doubt, be answered in the affirmative as regards those territorial laws where there is an universal succession, and the immediate right to the real estate is not considered as the subject of the disposition; while, according to English law, from which Story starts, the notion of an universal succession has no application to immoveables, and therefore there is no distinction between the acquisition of a landed property by testament and acquisition by a conveyance *inter vivos* so far as the question of form goes. In spite of other recognitions of the rule, "*locus regit actum*," all the German State treaties given by Krug make an exception of rights of real property, and subject them to the *lex rei sitæ*. Krug, pp. 50, 51.

[The French courts cannot inquire into the inducing causes of deeds granted in American form for the conveyance of heritage in New York, although they have been executed by a Frenchman in France (Leray de Chamont, Trib. civ. de la Seine).]

<sup>3</sup> Cf. Story, § 440.

<sup>4</sup> See, too, Wächter, ii. 383; Savigny, § 366, Guthrie, p. 179. So, too, the Convention between Bavaria and Würtemberg of 7th May, 1821, § 22; and the other South German Conventions founded on it, cited by Krug. The others speak of immoveables exclusively.

scarcely point to a case in the older authorities where a real right was determined by the *lex loci actus*, unless this happened to coincide with the *lex rei sitæ*; and whereas the general recognition of the *lex loci actus*, as regards obligatory contracts and testamentary provisions referring to an universal succession, serves to give security to legal intercourse, if extended to the acquisition of real rights in moveables it would produce the greatest confusion. No one can, for example, assert that if in our country a right of pledge in moveable articles can only be created by delivery of these articles, and can only exist by continued possession of them, these provisions, which substantially affect the security of all such rights in our country, do not need to be observed in a transaction entered upon abroad. It is quite possible, although not necessary, that a defective attempt to constitute or to transfer a real right may contain enough within itself to constitute a binding obligation to transfer or to grant a real right, in spite of the nullity of the grant or transference as not being in conformity with the *lex rei sitæ*; <sup>5</sup> the form of such an obligation is determined by the rule "*locus regit actum*."<sup>6</sup>

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<sup>5</sup> The question depends upon—1st, Whether the persons concerned intended at the same time, or, at least, intended eventually to originate a binding obligation; 2nd, whether they have observed the form recognised at the place where the contract was concluded or the form that would otherwise prevail. The first must be determined according to the circumstances of each particular case, and in particular cannot be assumed offhand in cases which are founded upon gratuitous considerations. Burge, i. p. 24, ii. p. 865; Story, § 436; P. Voet de Statut., c. 1, § 9, No. 2; Burgundus, i. 15, 16, 37; Rodenburg, ii. c. 5, § 9; Wächter, ii. p. 383, note 181. By the ordinance of 18th December, 1843, in Hanover, § 3, bargains concluded in different provinces, by which full or limited property, or a long lease of landed property is divided, conveyed, or surrendered, need a public deed in order to give them formal validity. No real right is conveyed by a bargain concluded in a foreign country without such a public deed; on the other hand, the provision of § 6, by which a private deed subscribed by both parties is essential to constitute a binding obligation to transfer one of these real rights, is not to be extended to contracts of this kind concluded abroad, in so far as the intention of parties to execute a binding contract is clear. [Cf. Erskine, iii. 2, 39.]

<sup>6</sup> This distinction is often not sufficiently attended to. In the judgment of the Supreme Court of Appeal at Lübeck, on 30th December, 1839, reported by Seuffert, 8, p. 2, it is rejected upon the ground that a binding obligation does "*virtualiter*" contain a conveyance of property. In this sense the contraction of debts may always contain an alienation of property "*virtualiter*."

## § 62.

Many writers, lastly, have asked, and answers of very different kinds have been given to the question, what law is to decide whether a thing is to be held moveable or immoveable in such a case as that where rents, or stocks, or a right in security is counted as immoveable by the *lex rei sitæ*, but by the *lex domicilii* of the creditor or the debtor moveable? <sup>1</sup>

This question may be easily answered by the following consideration: the mobility or immobility of a thing is in itself a natural quality, which is independent of every positive rule of law, and this quality cannot be ascribed to incorporeal things. The meaning of a law, by which certain moveable things or certain incorporeal things—*e.g.*, interest upon particular bonds, or rents of property—are to be treated as immoveables, can only be that to a certain extent those rules of law which apply to immoveables, should be also applied to things which in their nature are moveable, or to incorporeal rights which do not fall under this distinction at all. In this way the different views of authors on the point are explained. For instance, if this question arises as to the acquisition of a

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The rule *locus regit actum* may in this case also (cf. *supra.*, p. 139) be excluded by special provision. The form of the binding obligation is to be determined by the *lex rei sitæ*, if it is declared that such an obligation can only be validly contracted before the competent judge. Cf. the Prussian Statute of 24th May, 1853, § 2: "If landed property is to be divided by sale and purchase, or other contract of alienation, the contract must be concluded before that tribunal, which keeps the register of encumbrances." § 3: "If these provisions are not observed the contract is null, and therefore has no legal operation between the parties."

<sup>1</sup> According to Boullenois, i. p. 358, 360-4, in so far as the law of succession is concerned, the *lex domicilii* of the ancestor decides this question. Bouhier, chap. 29, No. 41, takes the domicile of the spouses as regulative of property belonging to them, in so far as the rights of third parties are not concerned. Christianæus (vol. i. decis. 252, No. 7), takes the *lex domicilii creditoris* as his principle, in case the legal relation in question concerns "*favorem et utilitatem ipsius creditoris vel eorum qui ex ejus capite causam et successionem asserunt.*" General answers are attempted by Rodenburg, tit. 2, No. 1; Burgundus, ii. No. 29; Dumoulin, in vet. Consuet. Paris. § 11, No. 10, No. 28; Burge, ii. p. 78; Story, § 447; Demangeat (note to Fœlix, i. p. 137, § 64); Beseler, i. p. 154; Renaud, i. § 42, p. 106. These writers propose to regard the *lex rei sitæ* only. Fœlix involves himself in a contradiction; in § 64 the *lex domicilii* is to decide universally, in § 61 the *lex rei sitæ*.

right to rents by way of succession, then, if there is, according to the provisions of the legislations in question, a universal succession, the *lex domicilii* of the person in right thereof, whose succession is in question, prevails, and the *lex rei sitæ* in case succession to the immoveables, from which the rents are drawn, is held to be a singular succession by the laws recognised at the domicile of the ancestor or at the place where the thing is.<sup>2</sup> If, on the other hand, the question is as to the validity of an assignation as against the debtor in a bond, then the *lex domicilii* of the debtor will rule, if the assignation is, with a view to his protection, made to depend upon the observance of the forms that regulate the conveyance of real right in immovables.

The view here adopted is specially supported by the fact that many systems of legislation give the quality of immobility to certain moveable or incorporeal things expressly for certain specified legal relations alone—*e.g.*, for the question as to whether they fall under the community of goods in marriage.<sup>3</sup>

We shall, then, apply the rule thus developed to the different rights in things;<sup>4</sup> that rule being:—

“Real rights are to be determined by the laws of the place where the thing was at the time when the act or the event occurred by which the right to the thing is sought to be affected.”

## B. POSSESSION.

### § 63.

It will scarcely be questioned that the possession of a thing is to be determined by the *lex rei sitæ*, even when

<sup>2</sup> [So decided in *Monteith v. Monteith's Trs.*, June 28, 1882, 19 S.L.R., 740.] The question is to be decided in the same way as to the property of spouses.

<sup>3</sup> Cf., *e.g.*, *Frankfurter Reformation*, ii. 3, §§ 1 and 2 (*Kraut. Grundriss*, § 82), cf., too, No. 49.

<sup>4</sup> Many writers here, too, apply the rule resting upon a *petitio principii*, that vested rights must be considered. By the form which we have given to the general principle, it is self-evident that things which a man has acquired in another country do not cease to be his property by being brought into the territory of some other legislative authority, which lays down different rules for the acquisition of property from those which are observed by the legislature of the former territory. For the acquisition of property is judged according to the laws of the place where the thing was at the date of the

that thing is moveable. The foundation of possession is the physical control of the thing, and that can only be exercised where the thing is.<sup>1</sup> The following remarks are all that need be made :—

1st, As Savigny suggests, the questions as to whether recompense is due, and if so, what, and what penalties can be enforced by private persons for illegal encroachment upon their possessions, are to be determined by that law which is applicable to relations of obligation arising from delict or *quasi delict*.<sup>2</sup>

2nd, A legal category which deals with the rights that arise from a protracted possession cannot, as we have already mentioned, be applied to things which are only found temporarily in the territory of a State. The right of the possessor to the fruits of the thing, by reason of his trouble expended on it, and the requisites of prescription, are, in the case of moveable things, to be determined by the *lex domicilii* of the possessor. An exception is recognised when the moveable thing, by the will of the possessor, has been permanently settled in a place. Here we recur to the general application of the rule of the *lex rei sitæ*.

3rd, Special restrictions often arise as regards the competency of possessory actions. The French "*Code de procédure civile*" contains, for instance, this provision (Art. 23) :— "*Les actions possessoires ne sont recevables, qu'autant qu'elles auront été formées dans l'année, du trouble par ceux qui, depuis une année au moins étaient en possession paisible par eux ou les leurs, à titre non précaire.*" We must separate the enactment merely referring to procedure from that material enactment which touches the right of possession ; this article provides : 1st (and this is a material provision as to the law of possession), That a right of possession, unless the possession has lasted for a year, cannot be vindicated by action. This applies only to things situated in France, but to them without exception. 2nd (and this is a mere rule of process), That unprofitable suits as to possession of shorter duration

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acquisition, and not according to the laws of some other place to which it may afterwards have been brought.

<sup>1</sup> Savigny, § 368 ; Guthrie, p. 193 ; Burge, iii. p. 126 ; Unger, i. p. 175.

<sup>2</sup> That is not always, however, the *lex fori*. See *infra*, §§ 87, 88.

are to be avoided—a provision that applies to all suits brought before French courts for the possession even of things that are situated abroad. If, in obedience to this rule of process, a suit for possession of a thing situated abroad be thrown out, it does not bar an action for the same end in the country where the thing is, if the laws of that place do not require the same length of possession, unless the judgment in France specially bore that the pursuer had no possession at all.

### C. PROPERTY.

#### § 64.

1st, The capacity of a person to acquire property is determined by the *lex rei sitæ*. Incapacity to acquire landed property is not a limitation of capacity to act, but of capacity to enjoy rights, and, therefore, is not subject to the *lex domicilii* of the person who acquires, but to the law to which the relation in question is subject for other purposes.<sup>1</sup> Those authors who do not make a clear distinction between the capacity to act and the capacity to enjoy rights are compelled in this instance to make an exception from the rule of the *lex domicilii*, which naturally should be preferred ;<sup>2</sup> but they cannot justify the exception on the score that they are here dealing with a case of a strictly compulsory law of a police character (cf. *supra*, § 33). Not to mention the entirely indefinite conception of a compulsory law, to adopt this view would make it necessary to apply the *lex fori*, and not the *lex rei sitæ*.<sup>3</sup>

Capacity to act is to be determined, even in reference to immoveables, by the *lex domicilii*. The view of many

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<sup>1</sup> Story, § 430 ; Fœlix, i. § 58, p. 118 ; Schäffner, p. 68 ; Savigny, § 367 ; Guthrie, p. 182.

<sup>2</sup> Cf. Savigny, *loc. cit.*

<sup>3</sup> The *lex rei sitæ* is, according to what we have laid down, the only rule for determining the capacity of legal persons to acquire, especially the capacity of ecclesiastical bodies ; and in the same way, the capacity of foreigners to acquire landed property. Judgment of the Supreme Court of Appeal of 3rd September, 1836, at Cassel (Henser, Annalen, ii., p. 752): "The Prussian laws can only serve as a rule, if the capacity to acquire landed property is restricted to certain classes of persons in Hesse."

writers, who desire that the *lex rei sitæ* shall determine such questions also, is the result of too broad a conception of the capacity to act,<sup>4</sup> and a consequent confusion between the capacity to test, which under certain circumstances is dependent on the *lex rei sitæ* alone,<sup>5</sup> and the capacity to act in the true and narrower sense. If a man is still a minor by the *lex rei sitæ*, but major by the *lex domicilii*, he could certainly, in any case, incur a personal obligation as to his right of property in estate situated abroad. The purchaser, to take that case, would only require, in such an event, to bring an action for completion of the contract, and then, since decree would fall to be pronounced in that action, the matter would stand in precisely the same position as if the sale had from the first been completely in the power of the owner. The application of the *lex rei sitæ* is in this case undoubtedly impracticable. In the converse case, if the seller is major by the *lex rei sitæ*, but minor by the *lex domicilii*, by applying the former law we should be led to this absurdity, which we have already refuted, that a person who is incapable of incurring an obligation to transfer a real right is yet in a position to transfer this real right itself (cf. § 7).

2nd, In the same way, the *lex rei sitæ* must determine questions as to the capacity of a thing to become the subject of private ownership; and also whether that which has no owner becomes the property of him "*qui occupat*"; that which is newly constructed the property of him who constructed it; or that which is found the property of the finder.<sup>6, 7</sup>

<sup>4</sup> So. Story, § 431. See on the whole question *supra*, p. 161 *et seq.*

<sup>5</sup> That is to say, if succession in immoveables does not involve an universal succession, *infra*, § 107.

<sup>6</sup> Savigny, § 367; Guthrie, p. 183; so too the question whether a treasure-trove becomes the property of the finder or of the public treasury.

<sup>7</sup> The Prussian Allgemeines Land Recht, i. 9, § 299-303, 315-323, 304-6, makes considerable deviations from the doctrine of the Roman law as to the requisites for acquiring property by specification (Koch, Preussisches Privatr., i. § 251). It cannot be doubted that if a thing is sold in a place by the laws of which it becomes, under the existing circumstances, the property of the buyer, irrespective of whether the seller was owner or not—for instance, if it is sold in the open market, or in an open shop—this



Confiscation, too, which has taken place in conformity with the *lex rei sitæ* must be recognised by a foreign State, without regard to the reason for which it was carried out.<sup>8</sup> It may be, for instance, failure to pay State duties. Everything that is brought into the territory of any State lies under its protection and the power of the laws there recognised.

Conversely, however, confiscation can only receive effect as regards things situated in the territory of the State itself.<sup>9</sup> So, if, at the date of the judgment imposing the penalty of confiscation, the thing in question is not in the country, then, in spite of that judgment, any alienation by the possessor remains good, and must be recognised even by the State whose officers have decreed the confiscation of the property. If anything shall have been adjudged to the person who found it, this mode of acquisition must also be recognised in a foreign country.

3rd, The forms of the voluntary transference of property are to be determined by the law of the *rei sitæ* alone, as we have already shown. By French law,<sup>10</sup> for instance, a contract of sale and purchase produces of itself, without delivery, the transference of the property in the goods sold : by com-

acquisition of property must be recognised even by the State to which the real owner belongs, although there may be no such law in existence there. [So L.J.C. Moncrieff and Lord Craighill in *Todd v. Armour*, June 8, 1882, S.L.R. 656.]

<sup>8</sup> The public treasury may vindicate in a foreign country goods which were imported contrary to regulations, and are liable to seizure and confiscation (Hert, iv. 18). It is another question whether the State has a right or a duty to carry into operation a sentence of confiscation pronounced by another State. Cf. *infra*, § 146.

<sup>9</sup> So Bartolus in L. 1, C. de S. Trin. No. 51 ; Chassenæus Comment. in Consuet. ; Burgund. Rubr. ii. tit. des Confiscations, No. 11 ; Mevius, proleg. qu. 6, § 14 ; Petr. Peckius, de Testament. iv. c. 8, § 8 ; Bouhier, chap. 34, No. 28 ; Ricci, p. 553 ; Casarejis disc. 43, No. 17 ; Danz, i. § 53, p. 179. Although the oldest writers make an exception in the case of confiscation imposed in terms of the *jus commune*, this is explained by the idea which prevailed in the Middle Ages, and frequently comes into notice in later times, that the Roman law was *de jure* good all over the world ; and all other systems were mere deviations by statute from it. They do not, even in that case, claim the confiscated property for the sovereign whose courts have imposed it, but for him who is supreme at the place where the thing is situated.

<sup>10</sup> Code Civil, art. 1138. [So too in England.]

mon Roman law delivery is necessary. The property in things moveable or immoveable which are situated in a country where the Roman law is the common law is therefore not transferred by a contract concluded in France among French people.<sup>11</sup> But the property will pass,—if the will of the parties remains the same, and if the thing in the meantime, before a third party has become its owner by tradition, is brought into France,—at the very moment when it reaches the territory of French law. Conversely, however, if the thing is situated in France, and the contract is made, say in Hanover, the property will then pass without delivery if the will of the parties would so have it.<sup>12</sup>

According to the principles here assumed, it is a necessary result that, if property has once been validly acquired by the laws of the place where, at the time of the conveyance, the thing was, then that acquisition is not thereafter rendered invalid by the removal of the thing to another place. According to Savigny's principle, which holds the place of the thing as the locality of all its legal relations, it is impossible in strictness to protect rights which have been acquired in any other way than by the rule that vested rights shall be respected—a rule already condemned by him.

4th, The acquisition of property by prescriptive possession is plainly connected closely with the prescription of actions for the vindication of property ; the latter will be discussed hereafter in this connection and with reference to moveables. Prescriptive acquisition must be determined by the *lex rei sitæ* ; this is the universal opinion of the Jurists,<sup>13</sup> and must

<sup>11</sup> So, too, Bluntschli D. Privatr. i. § 12, ii. : Burge, iii. p. 751 ; Savigny, § 367 ; Guthrie, 183-4. As to the validity of the contract in spite of the nullity of the transference or creation of the real right, see *supra*, § 61, note 5. The judgment reported by Seuffert, 6, p. 161, of the Supreme Court of Appeal at Lübeck, on 21st Oct. 1850, lays stress alone upon the *lex loci actus*. Cf. judgment of the Supreme Court at Berlin of 6th Feb. 1858 (Striethorst, 20, p. 141): "When a commission is given in a foreign country, the person giving it is assumed to have wished to subject himself to the laws of that foreign country."

<sup>12</sup> That is to say, if it were sold there by a mandatory living in France, and he not specially forbidden to sell upon credit, or if the price is paid. See *supra*, § 61, note 5.

<sup>13</sup> Molinæus in L. 1, C. de S. Trin. ; J. Voet, Comment. in Dig. 43-4, § 12 ;

obviously follow from the principles we have laid down. If, however, the law of the place where the property is gives minors privileges, by which any estate belonging to them cannot be made the subject of prescriptive possession in the ordinary way, then, no doubt, we are to assume that a law of the kind is meant to be for the advantage of all persons who, by reason of their minority, are under guardianship, and, therefore, even of those who, being resident abroad, are minors there, although by the *lex rei sitæ* they would be of full age.<sup>14</sup>

5th. Questions as to actions relating to property present more difficulties, and a more careful investigation is of importance on this head, both because there is so much difference among the different systems of law as to the duties and obligations of the possessor as against him who claims the property, and because special restrictions with regard to moveables have often been introduced in the interest of commercial security in general. Very many of these rules, which seem merely to affect the process for the acquisition of the legal right, are truly, as Savigny remarks,<sup>15</sup> part of the legal relation itself. In strict accuracy an action for property is nothing but the right of property under the special shape which the judicial claim requires it to take. The consequence is that, as the right itself is subject to the *lex rei sitæ*, so is the action, and the law that prevails at the seat of the court only steps in to regulate the duties of the parties in so far as these are mere matters of procedure.

The distinction which exists between the nature of moveables and immoveables is nowhere seen so clearly in operation as in the *Rei Vindicatio* and actions of the same kind. In the meanwhile we shall first consider the simpler case of immoveables.

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Bouhier, chap. 35, Nos. 3, 4; Boullenois, i. p. 364; Merlin, Rép. Prescription, sect. 1, § 3, No. 7; Pothier, de la Prescription, Nos. 247, 248; Hauss, pp. 33, 34; Günther, p. 737; Mühlenbruch, i. § 73; Massé, pp. 102, 103; Gand, Nos. 731-3; Burge, iii. p. 221; Wheaton, § 86, p. 118; Wächter, ii. p. 386; Oppenheim, p. 398; Schäffner, p. 75; Fœlix, i. § 63 *ad fin.*; and Demangeat's note.

<sup>14</sup> Cf. the remarks with reference to restitution (pp. 172-73). Gand, Nos. 731-733, is of a different opinion.

<sup>15</sup> § 361, pp. 146, 147 of Guthrie.

The *lex rei sitæ* is the rule not merely as to the essentials of an action claiming property, or any action on the same model founded upon some particular kind of possession (e.g., the *Actio Publiciana* of Roman law), but also determines the obligation of the possessor to keep the subject of the action scatheless, or to answer for its loss; to account for the increase and not to part with it fraudulently; and at the same time the right which he has to demand reimbursement of his expenditure on it, and to enforce this by detention; to take certain of the increase for himself, or to demand repayment of the price he paid for the property. This view derives special support from the consideration that, if possession and the rights arising from it are to be determined by the *lex rei sitæ*, the view which assumes this, but makes the *lex fori* decide the questions we have suggested, falls into a self-contradiction; for if the possessor, for instance, has a right to consume the increase before the action is raised, or before any *mala fides* arises, without being bound to make reparation, the result is that the pursuer can have no claim to it.<sup>16</sup> According to the view which takes the *lex fori* as regulative, the pursuer will have a dangerous option in his hands, assuming that a real action can be brought in the *forum rei sitæ* and in the *forum domicilii* of the possessor as well.<sup>17</sup>

An action for damages, or for the value of the article vindicated, against a person who, to prevent the success of a claim made against another, maliciously, and in spite of having no right of possession in the thing, throws himself into the action

<sup>16</sup> Savigny is of the opposite opinion, § 367; Guthrie, pp. 186, 187. See, on the other hand, Burge, iii. p. 126; Holschuh, i. p. 66; and the essay in Seuffert's and Glück's papers, for the application of law, vol. xiv. p. 187, there cited.

<sup>17</sup> This is of special importance if, in different provinces of one country, the Prussian A. L. R. and the common Roman law are recognised, and at the same time it is possible to institute actions *in foro domicilii* for recovery of immoveable property—e.g., in Hanover (Allgem. bürgerl. Processordnung of 8th Nov. 1850, §§ 5, 8). For instance, by the Prussian A. L. R. i. 7, § 210, it is only the *bona fide* possessor who has the *jus tollendi* in relation with the *Impensæ Voluptuariæ*, by Roman law the *mala fide* possessor has it also (L. 37, D. de R. V. 6, 1); on the other hand, by the Prussian law, i. 7, § 189, the *bona fide* possessor has right to all the increase during his possession (Koch, Privatr. i. § 170). Other important differences are to be found in the Prussian A. L. R. i. 7, §§ 191, 192 and § 219.

(*liti se obtulit*), is a pure question of a fine for a matter of procedure arising *quasi ex delicto*, and consequently to be determined by the *lex fori*. But it is different with the obligation of him *qui dolo desinit possidere*, in so far as his possession was given up before *litis-contestation*.<sup>18</sup> We find confirmation of the latter statement in the fact that, by the general theory of the Middle Ages, the *forum rei sitæ* constituted an exclusive jurisdiction, and in more modern systems has been retained, especially in State treaties for insuring mutual legal remedies.<sup>19</sup> If, therefore, an action shall be raised in some other court than that where the thing is situated (which is quite exceptional), all the less can we assume that the laws recognised at the seat of the court are to have any effect upon the material relations of the possessor who is pursued.<sup>20</sup>

With the vindication of moveables it is quite the reverse. The possessor can take these from one place to another at pleasure, and the stay of any article in any particular place seems, as a rule, to be merely accidental and temporary. Therefore, without any regard being had to the temporary stay of the thing in another place, the *forum domicilii* is always recognised and considered as regulative.<sup>21</sup>

<sup>18</sup> L. 25-27, D. *de Rei Vin.* 6, 1.

<sup>19</sup> See the numerous citations in Wetzell, p. 355, § 41, notes 47, 48; cf. J. Voet, Comm. in Dig. 5, 1, No. 77; Vattel, ii. ch. 8, § 103; Burge, iii. pp. 125 and 397. (The courts of common law in England and America declare that they are incompetent to deal with real rights connected with property that is not within their jurisdiction. Wheaton, § 86, p. 118; Story, §§ 551, 552.) Code de Procéd. Civ. art. 59. German treaties collected by Krug, pp. 40, 41. [Civ. Proc. Ord. for the German Empire, § 25, is to the same effect.]

<sup>20</sup> It is the natural result of this reasoning that the *lex rei sitæ* determines the prescription of actions in the case of immoveables. As a rule, too, it will coincide with the prescriptive acquisition. Yet some—as, for instance, Story, §§ 576 and 582—although they would determine prescription for the purposes of acquisition by the *lex rei sitæ*, would have the *lex fori* rule the case of negative prescription. Against this, see *infra*, note 33 and § 79. Yet, since by English law *actiones in rem*, which have to do with immoveables, can only be brought *in foro rei sitæ*, this view in its result coincides with that taken by us, in so far as English and American tribunals are concerned.—Story, § 581 *ad fin.*

<sup>21</sup> Even according to Roman law in its modern form, the *forum rei sitæ* is to be limited to such moveables as are to remain in some particular place, according to the intention of the possessor, either expressed or reasonably to

This circumstance is important for the interpretation of laws as to the vindication of moveables to this extent, that all limitations of the vindication introduced for behoof of the possessor, and not those alone which belong to a permanent relation of possession, are applicable in all real actions for delivery of moveables raised *in foro domicilii*. *E.g.*, the rule, "One hand must help the other," must be applied in the *forum domicilii*, although the thing claimed may be temporarily situated in some other country where this rule is not in force; and in the same way the exclusion of the right of recovering papers from the possessor. But besides these limitations, those, too, which, limiting the right of action, are inseparably involved in the acquisition of the possession according to the laws of the place where it was acquired, may be invoked by the possessor. (Such rights often appear in the form of limitations of the right of action, by way of regulations as to procedure; *e.g.*, "Things sold in open market are not, as a rule, subject to vindication." If one has bought an article in open market abroad where this rule is in force, he may appeal to it *in foro domicilii*, although there is no such limitation to be found there.)<sup>22</sup>

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be inferred, and therefore cannot be extended to goods upon a journey or ships put into port. It is only of things of the first kind that it can be said they are "*res in aliquo loco constitutæ*." It cannot be said of the latter kind, and that is the test demanded by L. 3, C. *ubi in rem actio*, 3, 19, the passage by which the *forum rei sitæ* was introduced. (Nov. 69, c. 1, applies only to the *forum delicti commissi*, and under this fall cases of disturbance of possession. The *forum rei sitæ* is good for immoveables only, according to the Hannov. allg. bürgerl. Processordn. § 8. Cf. too, Code de Procéd. Civ. art. 2).

<sup>22</sup> The notion that such limitations upon the right of action as, "One hand must help the other," or, "You must look for your credit where you left it," are given to the possessor of the thing claimed as material rights, is confirmed by the shape which these rules—belonging originally to German law, and arising from the peculiar shape which the process in such cases assumed—have taken in modern systems of legislation, where they bind the *bona fide* possessor to restore the thing only upon payment of the price he himself gave, or assign him the right of possession altogether. (Cf. Prussian A.L.R. i. 15, § 25: "If any person comes into possession of a thing that has been lost by the proper owner or possessor, through an onerous bargain with a person who is not open to suspicion, he must restore it." § 26: "He may, however, on the other hand, claim in return all that he gave for it." Austrian Statute-Book, § 367: "There is no action against a *bona fide* possessor of a move-

That is in consequence of the rule given above (p. 235) as of universal application in the law of things. This rule is the only one that can be applied, too, if the action for recovery of the thing happens purely by accident to be *in foro domicilii*—i.e., if the thing is intended to remain permanently in some particular place (*res in aliquo loco constituta*, L. 3 ; C *ubi in rem actio*, 3, 19). It is also true in cases where the possessor cannot appeal to the restrictions imposed upon such actions by the laws of his domicile—when, without any voluntary prorogation, or any jurisdiction given *revindicatione*, the real action for delivery of the moveable article can be, and, as a matter of fact, is, brought *in foro rei sitæ*. In such cases he cannot appeal to the limitations of the *lex domicilii*, because the plea that a *vindicatio* is, as a rule, brought *in foro domicilii*, and that, therefore, these limitations must have place, is rejected by the *lex fori* ; but if the *lex fori* makes provision for the conflict of territorial laws, the judge must follow its instructions (cf. *supra*, p. 61) ; (e.g., if a thing is stolen from a person in country A, where it is competent, as in the common law of Rome, to bring a *vindicatio* of any moveable against any third party who may be in possession of it, an action may be brought in country A while the thing is still there, as in the *forum rei sitæ*, without the necessity of any voluntary prorogation or jurisdiction *revindicatione* ; and if this is done, the possessor cannot appeal to such limitations of the vindication as are recognised only in his domicile and not in land A).

On the other hand, the defender cannot avail himself of any such limitations of the right of action, if they are not recognised either at the place where the thing was acquired,

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able thing if he can show that he came into possession of it either at a public auction, or from a tradesman dealing in things of that kind, or paid a price for it to anyone to whom the pursuer himself had intrusted it for use, or for custody, or for any other purpose. In these cases, the *bona fide* possessor has acquired the property of the thing.") The object of such restrictions upon vindication is the special security of the traffic of the country where they exist. They comprehend, therefore, all moveable things which are subject to commerce in that country—i.e., everything the possession of which is acquired in any such way in that territory. (To this head belongs the provision of the Code Civil, art. 2279 : "*En fait de meubles, la possession vaut titre.*") [Cf. *Todd v. Armour*, *cit. sup.* p. 239.]

or at the place of his domicile, although they may be recognised at the place of action. The rule, that under certain circumstances it is incompetent to vindicate moveables, does not mean that the law will hold such an action, if it be raised, as inadmissible on grounds of morality or public interest, as an *actio injuriarum aestimatoria* is declared inadmissible because no one should allow his honour to be salved with money; the simple object of limiting the right of vindication is the security of the *bona fide* possessor of a thing that does not belong to him, and can in reason only be applied to things that have been the object of legal commerce in the country.

The view now taken by us will in many cases give results in conformity with that which takes the *lex fori* as its groundwork, for actions for delivery of moveables are as a rule brought *in foro domicilii*. It differs from it, however, in so far as it assigns no weight to the purely accidental circumstance what court may be competent, in consequence, perhaps, of the right of revindication, or by a voluntary prorogation of jurisdiction; and it also avoids the contradiction that takes place when the *lex fori* as such is expressly applied, viz., that the rights of the pursuer and the possessor, which stand in indissoluble connection with each other, should be determined by different laws, the former by the *lex fori*, the latter by the *lex domicilii* or the *lex rei sitæ*.<sup>23</sup>

The laws of a place where a moveable was acquired are never applied as such in questions of prescriptive possession and the prescription of action (cf. *supra*, p. 230). In the case of those which have a permanent situation in some particular place, the *lex rei sitæ* rules; in all others, the *lex domicilii* of the possessor.<sup>24</sup>

There are, however, most discordant opinions on this question. According to one, the *lex domicilii* of the possessor always rules. This view<sup>25</sup> will in most cases coincide in its

<sup>23</sup> The limitations upon vindication are also material rights of the possessor. Cf. *supra*, note 16.

<sup>24</sup> So too, Massé, pp. 102, 103.

<sup>25</sup> J. Voet in Dig. 43, 4, No. 12. Pothier, *Traité de la Prescription*, No. 242. Merlin, *Rép. Vo. Prescription*, sect. 1, § 3, No. 7. Hauss's theory (p. 34), that the *lex domicilii* of the owner rules, has very little influence. It can only proceed upon the untenable assumption that the owner can only be



results with our own. Others would apply the *lex rei sitæ* universally.<sup>26</sup> This view is based upon the consideration that the foundation of prescription is enduring possession, and this must be determined according to the *lex rei sitæ*.<sup>27</sup> It is true that it is a permanent possession that is the foundation of prescription; the laws therefore which regulate prescription, must have reference to some other possession than that which is merely for a time exercised in our country.<sup>28</sup> If a thing has been temporarily in different places, then, according to the opposite view, there must be a separate calculation of the proportional time during which the thing remained in each of these different places, and this, then, must be brought down to the period of prescriptive acquisition or the prescription of actions required at the place where the thing happens to be last of all, just as was required by Roman law in the prescription of landed property, in case the pursuer and defender happened to have lived in different provinces during part of the period of prescription;<sup>29</sup> *e.g.* in the place where the thing happens to be at last, three years is the prescriptive period, in a place where it was before that, two years are required, and one year in a third, where the thing was for some time. In such a case, two thirds of a year during which the thing was in the one place, and one third of a year during which it was in the other, must each be reckoned as fully a year as that one year which we will suppose to have passed since the thing was brought to the country where the prescriptive period is three years. This calculation makes it indispensable that all the places in

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deprived of his property by the operation of the laws of his domicile. By this means, it might be that, under certain circumstances, an intolerable privilege might be conferred on foreigners, *e.g.*, if it should be that there was no such thing as prescription by their law, or only under conditions very hard to realise.

<sup>26</sup> So Molinæus in L. 1, C. de S. Trin.; Günther, p. 737; Mühlenbruch, i. § 73; Oppenheim, p. 398; Wächter, ii. p. 385.

<sup>27</sup> Savigny, § 367; Guthrie, p. 186; Unger, p. 176. But both of these authors speak of prescription only, and not of limitation of actions.

<sup>28</sup> The question, whether at a particular moment of time one became possessor is of course to be settled by the law of the place where the thing then was; and the *lex rei sitæ* may indirectly be of great importance.

<sup>29</sup> L. 12, C. de præscrip. 7, 33. Nov. 119, c. 1.

which the thing has been should be known, and also the length of time during which it was in each, and, therefore, is in many cases (e.g., in the case of goods on a voyage, or travellers' baggage) impracticable. Those authorities who propose that the *lex rei sitæ* should rule, almost all take the legal system of the place where the thing was last situated as decisive; but in that way that system has an influence attributed to it for the period during which the thing was not within its territory,<sup>30</sup> and it would be possible that an article, which had not yet been fully acquired by prescription, by a capricious removal to some other place, might be at once transferred into the property of the possessor. It may, no doubt, be necessary, according to the view we have adopted, to reckon up the different periods, if the possessor should change his domicile, or the thing be removed to another place, in those exceptional instances where the *lex rei sitæ* is to be applied. But, on the one hand, these changes will be far less common; and on the other, the point of time at which a man has acquired a new domicile, or a thing permanently settled in one place was removed to another, can, as a rule, be accurately determined.

Lastly, there is a theory by which a marked distinction is drawn between the limitation of real actions and the prescriptive acquisition of a right; while the latter, according to the character of the thing, is to be determined either by the *lex domicilii* of the possessor or the *lex rei sitæ*, the former, as being a rule in limitation of an action, and touching merely the question of procedure, is subject to the law of the place where the process depends.<sup>31</sup> But we have seen already that very many material rules of law are disguised as mere rules of procedure, and this is the case with the limitation of actions. It is not by any rules of process that it is made incompetent to raise an action after a certain period. If it were so, the limitation would first come into existence with the action, and it would not be for the judge to say by his

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<sup>30</sup> For the same reason we cannot agree with Schäffner's view (pp. 84, 85), by which these laws only are considered in whose territory the conditions of prescription first came into existence.

<sup>31</sup> Story, § 576 and § 582. This view is adopted by many with special reference to the prescription of personal claims.

sentence, as is the case, whether it had already been established.<sup>32</sup> There is accordingly a rule recognised by the older authorities: "*præscriptio pertinet ad decisionem litis, non ad ordinationem causæ.*"<sup>33</sup>

#### D. JURA IN RE ALIENA.

#### § 65.

The *lex rei sitæ* is the general rule for all other real rights, just as for the right of property. But there also, just as in the case of property, there are exceptional cases in which the *lex domicilii* of the possessor is applicable.<sup>1</sup> *Jura in re aliena* are merely limitations upon the right of property, and therefore depend on the same law as determines that right. Any exception can be of but little importance. *Jura in re* in single moveable articles can constitute but rarely the subject of an action in which there can be any discussion of the questions of international law.<sup>2</sup> It is only the law of pledge that will require a more thorough discussion, while the rules as to prædial servitudes, the personal servitudes over moveables and immoveables, emphyteusis, and superficies are clear.<sup>3</sup>

Savigny notices also the peculiar real rights which the Prussian law gives to the hirer, or the possessor on a similar title for his own behoof, of things belonging to others, even as against third parties in possession of them; and he is of the opinion that such a right in a moveable can only validly arise while it is within the territory of the Prussian A. L. R., and that in any other country which does not recognise such real rights the thing could not be vindicated against third parties in possession of it. The first proposition must, no doubt, be conceded, but not the second. Common Roman

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<sup>32</sup> This is the consequence of the nature of an action, its object being to declare rights already established, not to create new rights.

<sup>33</sup> Cf. *infra*, § 79.

<sup>1</sup> See *supra*, p. 231, on the question who is to be held as possessor in the sense here meant.

<sup>2</sup> See *infra*, in the subject of family law as to *ususfructus* over an entire estate.

<sup>3</sup> Cf. Savigny, § 368; Guthrie, 187, 188.

law assuredly recognises servitude rights of use in individual moveables, which can be followed out as against third parties in possession. The acquisition of possession in a country where the Roman law prevails gives no protection against the action brought by one in right of such a servitude, and does not defeat the right that originated in the territory of the Prussian A. L. R. The matter, however, would stand differently if the thing were subsequently possessed in a country where the rule as to moveables is *possession vaut titre*." In this case no real right can co-exist with that of the possessor, and so all are wiped out. Savigny's reasoning would end in the result, which he himself rejects, that if property can only be transferred in our country by delivery, then no action will lie upon a right of property acquired abroad by virtue of a mere contract without delivery, since our law knows nothing of property originating in a contract without a contemporaneous delivery.

The right of pledge is the real right in a thing that can be made good against a third party in possession, with the object of compelling satisfaction of a personal obligation. A right of pledge is, therefore, dependent on—1st, the existence of a valid obligation, and that by the law to which the obligation is subject;<sup>4</sup> 2nd, the law of the place in which the thing happened to be at the time of the legal transaction or occurrence on which the right of pledge is founded. The first of

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<sup>4</sup> The law of obligation recognised at the place where the thing is is only of moment in so far as it may be impossible, by reason of the theory of that law that it is illegal to satisfy the obligation in question, to constitute a right of pledge, although by the *lex loci contractus* the obligation may be quite valid; if, for instance, a security should be given over an estate in this country in satisfaction of a gambling debt. The cases are the same as those in which it would be incompetent to raise action in our courts (Burge, iii. p. 390). As the pledge seems to secure the obligation, it is only valid in so far as the personal obligation is legal according to the law regulating it; and in the same way, it only covers such interest as is permitted by the *lex loci contractus*, although by the *lex rei sitæ* a higher rate might be allowed (Burge, iii. p. 395). See, too, the judgment of the Supreme Court of the United States, reported there. No doubt the case is different, if by the *lex rei sitæ* the validity of the pledge is declared to be independent of the validity of the obligation. In that case we have not to do with any true right of pledge, but with a right to a determinate or indeterminate return from the estate. Cf. Baumeister, *Hamburgisches Privatr. i.* p. 173.

these conditions belongs to the law of obligations ; it is the latter only with which we propose here to deal.<sup>5</sup> The prevailing view, then, is, that the existence of the right of pledge is in general determined by the *lex rei sitæ*, although many authorities, simply on the ground of the fiction of the situation of moveables at the domicile of the owner or possessor,<sup>6</sup> make an exception in the case of moveables, and judge of the conditions of the origin of the right by the *lex domicilii* of the pledger.<sup>7</sup>

There is no reason for departing from the general rule as to the application of the *lex rei sitæ*, since it does not require any permanent relation of possession to originate the right of pledge.<sup>8</sup> In many cases, however, the view we have taken will coincide in its results with that which makes the *lex domicilii* of the debtor the rule ; for moveables can be brought into the territory of that country to which the debtor personally belongs, and then, if the legal relation from which the pledge takes its rise continues, these moveables will come within its scope in obedience to the *lex domicilii*. The following example may be taken : It is competent by Roman law for a man to pledge his whole estate—*i.e.*, everything which is *in bonis* of him at the present time, and everything which may come to be his. By common Prussian law such a universal pledge is invalid. If, then, a person domiciled, let us say, in Hanover, where the common Roman law is recognised, pledges his whole property, present and future, and owns a picture gallery in Berlin, the creditor can make no claim in virtue of the pledge over that gallery at the time ; but so soon as it is brought to Hanover

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<sup>5</sup> See *supra*, § 61, note 5, as to the question whether a contract of pledge, that does not by the *lex rei sitæ* create a real right, gives a personal claim to the executrix of such a right against the other party to the contract. The provision of the Prussian A. L. R., i. 20, §§ 402, 403, does not negative it. It is only meant to apply to the ordinary case of a contract concluded between natives at home.

<sup>6</sup> So J. Voet in Dig. 20, 2, No. 34 ; Boullenois, i. pp. 833, 4 ; Matthæus de Auctionibus, i. cap. 21, No. 41.

<sup>7</sup> As to the application of the *lex rei sitæ* to immoveables, see, besides the authors named, Rodenburg, ii. p. 1., c. v. § 16 ; and those cited in Note 8.

<sup>8</sup> Wächter, too, ii., p. 389 ; Günther, p. 737 ; Massé, ii. p. 96 ; Fœlix, i. p. 134.

it falls under the general pledge, if the pledger is still owner of it.<sup>9</sup>

Doubts have also arisen in connection with the so-called statutory or tacit rights of pledge—i.e., these instances in which a right of pledge is by the law of the land declared to arise at the origination of the legal relation, and independently of any declaration of will by the parties. Does, then, such a right come into existence if the *lex rei sitæ* attaches it to the particular legal relation in question in every case, and without regard to the *lex loci contractus* or the *lex domicilii* of the parties? Or does it arise only when the *lex loci contractus*, or the law that has to determine the legal relation in other aspects, conjoins a tacit right of pledge with the legal relation in question? Or does it only arise when both systems, both that of the *lex rei sitæ* and that which regulates the legal relation, for the security of which the pledge is given, are at one upon the point?

Each of these theories is adopted by different authors. The first is supported by the universal application of the *lex rei sitæ* in the law of things;<sup>10</sup> the second upon a tacit contract of pledge between the parties.<sup>11</sup> We cannot adopt either of them. We reject the second, because a tacit contract is something quite different from the contract which is said by a fiction to take place here. The tacit contract always depends upon a declaration of will, although that may only be inferential from the transactions of the parties. The statutory right of pledge, however, arises spontaneously, although neither of the parties knew that such a right was

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<sup>9</sup> A. L. R., i. 20, §§ 411, 412, 402-8, 109-11.

<sup>10</sup> Cf. Rodenburg, ii. pars i. c. 5, § 16; J. Voet in Dig. 20, 2, No. 34; Günther, p. 737. Cf., too, the judgment reported in the official journals of the judge of the Supreme Court of Baden, vol. xiii. (1852-53). By this judgment a foreign married woman was refused the statutory right of pledge in real estate belonging to her husband in Baden, because married women who are foreigners can only make good a right of pledge under the same conditions as a native married woman can; and these conditions, among which was an antenuptial marriage contract in public form, were wanting in the case under consideration.

<sup>11</sup> It is a condition of this second theory that there shall be no special form laid down by the *lex rei sitæ* as essential for the origination of a right of pledge—e.g., delivery of a moveable article or registration in public records.

involved in their contract, or even although they believed that the contrary was the case.<sup>12</sup>

If this right of pledge were to be referred to a tacit contract, it might always be defeated by means of the same legal remedies as those by which the dissolution of a contract is brought about. That, however, is certainly not the case—*e.g.*, with reference to the statutory right of pledge given by the Roman law to persons under guardianship over the estate of their guardians, or to children over the estate of a *parens binubus*.<sup>13</sup> But it is just as unsatisfactory to hold that the *lex rei sitæ* alone shall give a statutory right of pledge as an accompaniment of the legal relation in question. The statutory right of pledge depends upon this consideration, that the law holds the relation in question worthy of special protection, and in need of it. If, then, that relation does not fall under the *lex rei sitæ*, but under a different law, which does not consider this protection necessary, it is not to be assumed that that protection was intended to have been given by the *lex rei sitæ* in spite of the other law—*e.g.*, if the law which regulates the administration of a ward's estate limits the power of the guardian, so that the fiction of a statutory right of pledge over his estate is unnecessary, it would seem strange that the law of another country should add a statutory right of the kind to the other safeguards which it provides; and it would be specially inconvenient if, for example, the law of the domicile required a special bond of caution from the guardian,<sup>14</sup> while at the same time his estate abroad was burdened with a general statutory pledge, from which the law of his domicile released him.<sup>15</sup>

<sup>12</sup> But there must be no declaration of will excluding the right of pledge.

<sup>13</sup> Cf. Puchta Pandects, § 200.

<sup>14</sup> Cf. judgment of Court of Appeal for the Rhine Provinces at Berlin on 20th February, 1843 (Volkmar, p. 118): "The 2135th Article of the Code Napoleon requires that a native guardian's administration should be according to native laws. If a foreign country recognises the right of pledge, but confines it to his own territory, it is not to be extended over the boundaries."

<sup>15</sup> Fœlix, i. p. 150. If the transaction in question falls under the *lex rei sitæ*—as is generally the case, for instance, if one has lent money to repair a house that has fallen into ruin—it is enough, of course, that the *lex rei sitæ* should give a statutory right of pledge. The foreign lender has the statutory right of pledge necessarily involved in such a loan by the provi-

But the right of pledge that is given by the *lex rei sitæ* cannot be thrown out of account altogether merely because the person for whose behoof it exists belongs to another State. For instance, the claim of a married woman who is a foreigner, over her husband's estate, on account of what she herself has brought as dowry, cannot be resisted if this right of pledge exists also by the *lex domicilii* of the spouses.<sup>16</sup>

Statutory rights of pledge over moveables are to be determined by the same rules, and the only speciality to be noted is, that a statutory right of pledge does not then cease to exist if the moveable is taken into a territory whose system of law does not recognise a right of pledge at all or at least in the circumstances that exist; it does, however, cease if within the limits of the latter territory, and by its laws, any

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sions of Roman law (L. 1, D. 20, 2), if the house is in a country that recognises the common Roman law. Cf. *infra*, Law of Obligations, § 66, note 26.

<sup>16</sup> French practice (cf. the judgment of the Royal Court at Amiens on 18th August, Sirey, 34, p. 2, page 482) and many French authors, such as Gand, No. 716, Massé, 331, refuse wives and minors who are foreigners the statutory right of pledge given to such persons over real property belonging to the husband or guardian situated in France, on the ground that the *hypothèque légale* belongs to *droits civils*, to which no foreigner can make any claim. We must, however, throw aside this exception to the rule, adopted universally for international commercial relations, that foreigners and natives have equal capacity for rights in the eye of the law; and in more modern times authors of repute have declared against it—e.g., Demangeat, in his note to Fœlix, i. p. 151; The Répertoire of Merlin and Troplong (see the quotations in Massé, *loc. cit.*). The enactment of the 2128th Article of the Code Civil rests upon a confusion between the executorial force of a deed and the establishment of a right of pledge by means of a deed. By older French law, every assignation in security contained in a deed attested notari ally, and also in any private document adopted before a notary, created, *ipso jure* and without the necessity of any special stipulation, a pledge over the whole estate of the debtor, in consequence of the general executorial force of the deed (Zacharia, ii. § 204, note 6). One does not see why the owner, who can alienate his property and burden it with servitudes by a legal transaction abroad, is disabled from granting a security over it by means of a deed publicly executed abroad. Cf. Demangeat in his note on Fœlix, ii. p. 221. We must not confound this case with that where, in order to constitute a right of security over a husband's property, an entry in the register is required to give publicity to the marriage. (Cf. the judgments of the Royal Court at Montpellier of 15th January, 1832, Sirey, 23, 2, p. 301; and of the Court of Appeal at Paris of 16th January, 1824, Sirey, 35, 2, p. 482, note I. p. 483.)



person acquires a real right in the thing (*e.g.* by possession, if the rule "*possession vaut titre*" obtains there), that is inconsistent with the antecedent right of pledge. This doctrine is of special importance in the case of ships, since there is a statutory right of security given by many legal systems in respect of services done for the ship's benefit,<sup>17</sup> to enable those who have rendered these services to recover; other systems do not give it. According to the opposite view,<sup>18</sup> any implugging by maritime law would give the creditor no security, and our view is, therefore, recommended by the exigencies of commerce.<sup>19</sup>

Savigny<sup>20</sup> calls attention to the following case: by the Prussian A. L. R., a right of pledge in moveables arises only by delivery of them to the creditor; by the common law of Rome, it is created by an informal contract. A moveable thing has then been pledged by an informal contract in a country where the common Roman law is the rule, but is subsequently brought into another country, where Prussian law is in force; according to Savigny that thing can not be claimed by the creditor, because the right of pledge created by bare contract is quite a different legal institution from that which may be created by delivery of the thing itself, and the two institutions have nothing more in common than their name and their general object, and therefore the creditor would be appealing to a legal institution unknown to the law of Prussia. If this reasoning were sound, then, if we suppose that some system of law held that a ship could not be validly implugged except by a written document, a contract of pledge validly concluded by word of mouth in some other State whose laws permitted it to be

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<sup>17</sup> Cf., *e.g.*, Code de Commerce, art. 191-4.

<sup>18</sup> The view taken in the text is confirmed by the judgment of the Supreme Court of Louisiana reported by Story, § 327*a*. The case of vindication of goods sold ("*stoppage in transitu*," as it is termed in England) is analogous, if by the law of the country where the thing was at the time of the sale the property is not passed, and the goods are then claimed by the seller at a place, by the law of which the property is passed. See the decision of an English court upon this point in conformity with the view in the text. Story, § 402, note. [Inglis and Underwood, 1, East. 515].

<sup>19</sup> Cf. Story, § 402*a*.

<sup>20</sup> § 368, Guthrie, p. 191.

so constituted, would not be recognised in the former State. But, putting aside the very dangerous consequences of this doctrine, Savigny's whole reasoning rests, as we have noted, upon that ambiguous rule, that a right which could not have been created by the law of our country in the foregoing circumstances, should not be recognised by us. There can always be found in one State legal institutions analogous to those of others, although they may differ from them widely in details.<sup>21</sup> Are these institutions then identical or entirely different, and not to be mutually recognised? This question is not to be answered thus, that wherever you have any difference at all, there is to be no recognition,—a result which would lead to that general exclusion of all foreign rules of law, a result which Savigny himself attacks. It is not easy to see wherein lies the distinction between the present case and that in which property is passed in one country by delivery and in an other by a bare contract, in which latter case Savigny recognises that the property acquired by virtue of the bare contract is to be treated as operative in the other country also; <sup>22</sup> in the one case, as much as in the other, we are dealing with various forms of the constitution of real rights. But it is true that in the case put the view we have adopted will in its result coincide with that of Savigny. The Prussian A. L. R. provides besides,<sup>23</sup> that by a voluntary surrender of the possession of a corporeal thing given in pledge the real right is absolutely lost. If any one acquires, or has the possession of a moveable thing, which has been withdrawn not involuntarily from the possession of the person who had right to it, the right so acquired is irreconcilable with the right of pledge, and therefore does away with it.

In this way, too, we can dispose of a remark of Thöl,<sup>24</sup> who thus attacks the general application of the *lex rei sitæ* to real right in moveables: "Two Prussians contracting, who, for instance, wished to constitute not a pledge (*Faustpfand*) but an hypothecation over a thing, a right which Prussian

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<sup>21</sup> For instance, paternal power gives in one country different rights over the child from what it gives in another.

<sup>22</sup> § 368, Guthrie, p. 192.

<sup>23</sup> I. 20, §§ 255-5.

<sup>24</sup> *Introductio*. § 84, note 9.

law does not recognise, need only take the thing for a short time over the frontier." But if a system of law recognises only a pledge in moveables, then any third person in possession has a right that absolutely negatives their right.<sup>25</sup>

The intention of the parties will rule in a question with the pledger as to the material subject of the pledge. We must have recourse to the same principles as are recognised in the interpretation of obligatory contracts to determine the meaning of accessory provisions,<sup>26</sup> *e.g.*, questions as to what profits the creditor may claim.<sup>27</sup> If we are dealing with immoveables, the *lex rei sitæ* must, in general, rule.

The special limitations of actions upon pledge, and the pleas competent to the possessor, are subject to the same laws as determine the competency of the *rei vindicatio*. This is specially true of the plea of retention on account of other claims competent to the creditor.<sup>28</sup>

The priority of rights of pledge is determined by the *lex rei sitæ*; and as regards immoveables there can be no question of this. In moveables the law of the place where the thing was at the moment the competition took place decides; this is a result of the rule, that in so far as one acquires a new right in a thing in one territory, the right which was previously acquired in it in another territory is limited or destroyed.<sup>29</sup> (Cf. § 128, note 9a).

<sup>25</sup> Cf. Wächter on the laws of Würtemberg, ii. p. 388.

<sup>26</sup> *E.g.*, according to the A. L. R., i. 20, §§ 26, 225, 227, the agreement that the pledgee shall not have a right to part with the pledge is so interpreted that he can satisfy himself by the fruits and by the use of it, or, if in the circumstances this cannot have been the intention, that the thing shall not be sold unless there be a concurrence of diligence upon the debtor's estate, although that does not prevent a personal action against the debtor. The agreement in question is intended, according to Roman law, to prevent a sale without three intimations, l. 4, 5, D. de pignor. art. 13, 7.

<sup>27</sup> See *infra*, the law of obligations, § 66, note 26.

<sup>28</sup> By Prussian law, A. L. R., i. 20, §§ 171, 173, the plea of retention is only competent to enforce claims by the pledgee arising out of the transaction of pledge, but by Roman law it does not matter to what the claims have reference.

<sup>29</sup> Cf. judgment of ii. Civil Senate of the Supreme Court of Appeal at Celle, on 17th April, 1861 (Seuffert, 14, p. 445), "The writing which forms the foundation of the pursuer's contention cannot give him the right of preference which he claims in relation to the impignorated vessel, for a claim of bottomry, according to our law, does not involve any privileged right of security, and the privileges which are accorded to it by the law of Hamburg,

Rights, as well as corporeal things, may be made the subjects of pledge. To pledge a right is simply to assign it conditionally, in the event, that is to say, of the debtor failing to pay or to pay timeously. Such pledges are ruled by the law to which the right so impignorated is otherwise subject; e.g., when personal claims are pledged, the law which is applicable to the assignation must be respected; and when rights carrying with them a disposition in security are pledged, the *lex rei sitæ* as well, since the right of pledge, and consequently the conveyance of such a right are subject to the *lex rei sitæ*.

Real rights of purely Germanic origin, such as the right of sporting, of fishing, and the like, or peasant proprietary rights, rights of entail, or feu rights,<sup>30</sup> must be determined by the *lex rei sitæ*, and no doubt as to that has ever arisen except on the following point.<sup>31</sup> It is possible that, in the case of a feu right, the feudal court should have a different law from that which prevails at the place where the *fundus serviens* is situated. Is the *lex rei sitæ* or the law of the court to decide? This question is much debated, especially among French jurists.<sup>32</sup> There is a preponderance of practice in favour of regarding the law of the place where the feu lies as regulative, in so far as there is no question of the intention of the overlord or of the formalities to be observed in the feudal court.<sup>33</sup> And this is sound, since the days are gone when the feus belonging to a particular court constituted a separate territory.<sup>34 35</sup>

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cannot regulate the order of preference of real rights in a competition in this country, although the contract that gave rise to the real right may have been under the regulation of the law of Hamburg."

<sup>30</sup> Hert., iv. 62; Boullenois, i. p. 500; Bouhier, chap. 30, note 8; Ricci, p. 599; Hommel Rhaps., vol. ii. obs. 409, No. 4; cf. Beseler., ii. § 125, ii.

<sup>31</sup> Savigny, § 368; Guthrie, p. 193; Holzschuher, i. p. 80.

<sup>32</sup> Cf. Boullenois, i. p. 880-885; Bouhier, chap. 25, No. 33. chap. 26, No. 220; Molinæus in Consuet., Paris, tit. i., Des fiefs, § 12, No. 37; and Burgundus, vii. 6.

<sup>33</sup> Cf. Bouhier, chap. 29, No. 13, 7, 54; Rodenburg, ii. pars. i. c. 5, § 17; P. Voet, 9, 1, § 56; J. Voet, Digressio de feudis in the Comm. ad Dig. Lib. 38.

<sup>34</sup> Seuffert, Comm. i. p. 258, note 17.

<sup>35</sup> The judgment of the Supreme Court of Appeal at Jena, on 11th May, 1852, lays down that the form of the renunciation of a feu-right is to be

## IV. LAW OF OBLIGATIONS.

## A. GENERAL PRINCIPLES.

## § 66.

*Obligatio* is the name for that legal relation whereby one person, the creditor, has a right to compel another, the debtor, to do some act. The one, then, is bound to the other to do something which, as a rule, implies a pecuniary or patrimonial result, or may be reduced to such a result.<sup>1</sup>

In the case of such a relation of obligation, the following local laws may present themselves for consideration:—1st, the law of the place where action is brought; 2nd, the law of the place where the obligation had its origin, whether that consisted in a declaration of the will of the parties—a contract or legal transaction—or arose immediately by virtue of some statutory provision as to a particular state of facts, without reference to the will of the parties (*quasi ex contractu, ex delicto quasi ex delicto*); 3rd, the law of the place where the obligation is to be performed; 4th, the law of the creditor's domicile; and 5th, the law of the debtor's domicile.

The opinion that the law of the place in which the action is raised is to decide exclusively as to the relation of obligation between the parties is only adopted by those who reject entirely the application of foreign law, and give the judge as his sole guide the law that prevails at the seat of his court. This opinion we have already impugned in discussing the general principles of private international law. It is unnecessary to repeat the arguments that were then urged.

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determined by the *lex rei sitæ* (Seuffert, 13, p. 161). A distinction, however, would be made between the case where there was a transference of a real right in a feu by the person renouncing it in favour of another person who was under the same feudal allegiance,—where the *lex rei sitæ* would rule,—and the case where an *exceptio ex pacto* might be set up against the person who tendered the renunciation, where the rule "*Locus regit actum*" must rule. The distinction is, that by observing the forms of the *lex rei sitæ* all successors, by observing those of the *lex loci actus* all heirs of the person renouncing are excluded.

<sup>1</sup> Cf. Puchta Pandects, § 219; Arndt's Pandects, § 201.

A more popular and undoubtedly a better-founded theory<sup>2</sup> is that which takes as its guide the law of the place where the obligation arose, or, more accurately, of the place where the act was done, or the event happened out of which the obligation took its origin. It has been urged in support of this theory that every person who treads the soil of a country subjects himself to the law that prevails there, and must acquire some knowledge of it. As a matter of fact, there is an undeniable expediency to recommend the application of the *lex loci contractus* in many cases. For instance, how could trade possibly be carried on at fairs, markets, and exchanges if every one who made a contract there could appeal to the unknown law of his domicile, or of the place where it might so happen that payment was to be made?

But yet we cannot, for the following reasons, assent to this theory. In the first place, it seems absurd that, as would be the result of this theory, if two natives of this country happen to make a contract abroad which they intend to fulfil in this country, foreign law, which may be entirely unknown to both of them, should regulate it. That would open a door of escape from every law of the country. The parties would only require to make a journey abroad in order to withdraw themselves from all prohibitive statutes, such as usury laws. And *quid juris* if the place of the completion of the contract could not be ascertained, because it took place during a journey by coach or rail? Is the transaction in such a case always to be void? Lastly, how could a contract concluded between persons abroad be brought to determination at all, since we are landed in this circle—that the question in what place the contract was originated could only be answered by a rule of law, and it is *ex hypothesi* undetermined what law is to be applied?<sup>3</sup>

A third theory, which is also adopted by a large number

<sup>2</sup> Bartolus, in L. 1. C. de S. Trin. No. 13; Burgundus, iv. No. 7, 29; Hert, iv. 10; Holzschuher, i. p. 71. Cf. too, Wächter ii. p. 44-6, p. 396, who declares himself in favour of this theory in so far as the point of the autonomy left to parties is concerned. Yet most of the adherents of this theory allow the place of fulfilment to decide sometimes. Kori, iii. p. 25.

<sup>3</sup> Thöl, § 85, note 2.

of jurists, regards the place of performance as regulative.<sup>4</sup> This theory is just as unsound. No doubt it must be allowed that performance is the end and object of the obligation to which the whole view of the parties is directed.<sup>5</sup> This does not by itself, however, justify the subjection of the obligation exclusively to the law recognised at the place of performance. All that one can infer is, that in points dependent upon the agreement of parties there is foundation for a voluntary subjection to the law of the place of performance, by virtue of that expectation of parties which is directed to that end ; while the law of obligations consists to a large extent, although not exclusively, of rules which may be avoided at the pleasure of parties. But even with this limitation, it is impossible, without a revolt against the general logical rules of interpretation, to carry out the theory of the rule of the place of performance in regard to obligations ; for even if we leave out of account that, since parties are ignorant of the law that prevails at the place of performance, we cannot assume them to have subjected their contract voluntarily to its application,<sup>6</sup> an alteration in the place of performance made subsequently to the conclusion of the contract must alter the contract in each and every point, if the law of the new place of performance differed from that of the old ; and if there are several places of fulfilment, we are at a loss for any rule of interpretation.<sup>7</sup>

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<sup>4</sup> P. Voet, 9, 2, No. 12 ; J. Voet, in Dig. 22, 1, § 6 ; Seuffert, Comm. i. pp. 254, 255 ; Savigny, 372 ; Guthrie, p. 222 ; Walter, § 48 ; Unger, p. 179 ; Bluntschli, D. Privatr. i. § 12 ; Burge iii. p. 757.

<sup>5</sup> Savigny, § 370 ; Guthrie, p. 199.

<sup>6</sup> *E.g.*, The obligation of a native of Hamburg, who takes in Hamburg a loan from another native to be repaid to him in China, would have to be determined by the law of China. Cf. the judgment of the Supreme Court of Lübeck reported by Goldschmidt, Zeitschrift für Handelsrecht, ii. pp. 139, 140. The defender had pleaded that it was customary in Constantinople not to reckon the first and second days after a ship's arrival among the lay-days. The court held that a custom of the kind could not regulate the case under consideration, where the question was as to the meaning and legal result of a contract concluded in an English port. The defender would have required to aver and prove a custom of the kind in England.

<sup>7</sup> Where, for instance, are we to say that the place of performance of the obligation of the carrier is ? Perhaps the answer would be, at the destination

An appeal is made to the fact that by Roman law the *forum contractus* was set up in the place where the obligation was to be performed ;<sup>8</sup> and Savigny especially tries to make out that the local jurisdiction, as well as the local law of the obligation depends upon a voluntary submission of the parties, and therefore that the rules which regulate the former are to be applied also to the latter.<sup>9</sup> But, in the first place, the Romans, in determining the jurisdiction, had no intention of laying down what the law of the obligation was to be. Further, by Roman law the *forum contractus* was not exclusive, but concurrent with the *forum domicilii* of the debtor. This could not be the case if the Roman law had conceived the place of performance to be the seat of the obligation. In the third place, it is at variance with the general principles adopted by Savigny himself, and by far the greater number of authorities, to conclude from the competency of a court that the law recognised at its seat is uniformly applicable. By a similar deduction, we should hold that the law recognised at the seat of the court which had to decide any case must rule the case in all its bearings.<sup>10</sup> Lastly, we shall show (cf. § 120, note 8) that it is not by any means the case that the Roman law unconditionally set up the *forum contractus* in the place where the obligation was to be performed.

We have left, therefore, the domiciles of the creditor and of the debtor to choose between, and the latter is no doubt to be preferred as regulative. The person of the debtor is without doubt more closely bound up with the whole legal relation than that of the creditor. The person of the creditor may vary without destroying the obligation, but a change in the person of the debtor is equivalent to

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of the goods. But the carrier has to perform the obligations laid upon him at every moment of the transport.

<sup>8</sup> L. 19, § 4, D. de judic. 5, 1 ; L. 1, 2, 3, D. de rebus, auct. jud. 42-45 ; in particular, L. 23, D. de O. ct. A. 44-47. "*Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit.*"

<sup>9</sup> Savigny, §§ 369 and 370 ; Guthrie, pp. 196 and 198.

<sup>10</sup> Against the application of the law recognised at the place of performance, see Wächter, ii. p. 42 ; Thöl, § 85, note 3 ; Kori, Disc. iii. pp. 22, 23.



the extinction of the old and the establishment of a new obligation;<sup>11</sup> and although the will of both parties may have equal weight at the origin of the obligation,<sup>12</sup> the performance depends in the main upon an act of the debtor, and any active step on the part of the creditor is either altogether unknown or, at all events, quite subordinate to the other.<sup>13</sup> Neither the decisions of the courts nor the voice of the authorities has adopted the view that, as a rule, the law of the creditor's domicile should prevail.

On the other hand, Molinæus,<sup>14</sup> and lately Thöl,<sup>15</sup> have taken the debtor's domicile as their principle.

We are of opinion that the last is the correct theory, and that on the following grounds, as well as upon those already adduced:—The State allows its subjects to undertake obligations to foreigners, and in a foreign country, but, as a rule, only under the same regulations as govern their domestic intercourse—to release them from all the restrictions which are set upon such intercourse in their own country would be a concession to foreign countries and to foreigners not easily justified.<sup>16</sup> The absolute rules of the law of obligation, which do not give way to the caprice of private individuals, are, as a rule, established in the interest of the debtor. It is not to be supposed that this care will cease if the subject of a State should happen to have contracted, or should be obliged to perform, a contract abroad. In so far as the interpretation of the will of the parties is concerned, however, we must undoubtedly proceed from the position that every man expresses his will in conformity with the law and statutes which he knows, and therefore has had in view the statutes of his own domicile. This rule of interpretation is applied to unilateral transactions, especially testamentary dispositions, even by those who propose to determine contract

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<sup>11</sup> That the person of the debtor is changed by the substitution of his heirs is apparent only. The heir represents the person of his predecessor in patrimonial relations.

<sup>12</sup> Obligations *ex delicto* arise from the act of one person.

<sup>13</sup> Savigny, § 369; Guthrie, p. 195.

<sup>14</sup> In L. 1. C. de S. Trin.

<sup>15</sup> § 85.

<sup>16</sup> Cf. Thöl, note 9.

obligations according to the *lex loci contractus*, or according to the law recognised at the place of performance.<sup>17</sup>

Lastly, the view we have here maintained is supported by the circumstance that, in the great majority of cases, action to compel performance of a personal obligation, with a view to the possibility of forcing compliance therewith, is brought at the domicile of the debtor. The *judex domicilii* must feel himself all the more bound to apply the *lex domicilii* that, as we have already noticed, a consistent application of the *lex loci contractus*, or of the law that is recognised at the place of performance, seems irreconcilable with the maintenance of the law of the judge's own country. For instance, if one desired to evade the laws as to the maximum rate of interest, he would require merely to stipulate for a foreign place of performance, in order to be able to secure payment by an action in his own country. We must, however, keep in view that if the domicile be changed after an obligation has been undertaken, it has no influence upon the import and validity of the obligation, for this reason, that otherwise there would be a retroactive force attributed to the domicile. It applies not to obligations undertaken by subjects of the State before they became subjects, but only to such as they have undertaken while they have been subjects.<sup>18</sup> This is scarcely likely to be disputed, and is only specially mentioned in order to avoid misunderstandings.

The following difficulty has been raised in reference to the case that the contracting parties have not the same domicile. The essence of the contract, it is said, consists in a concurrent declaration of will upon either side (*duorum pluriumve in idem placitum consensus*).<sup>19</sup> If we should interpret the declaration of both parties according to the law of their respective domiciles, then we could never reach the notion of a *consensus*; and on the other hand, there is, it is said, no ground at all for conceding an absolute authority to the laws of either of the parties. If the parties to a contract have in contemplation a law that will give effect to their contract, they will

<sup>17</sup> Cf. Fœlix, i. p. 159 and p. 227.

<sup>18</sup> For exceptions which, however, apply to the annulling of obligations, however they may be conceived, see *infra* §§ 78, 80.

<sup>19</sup> L. 1, § 2, D. de pactis.

generally proceed on the footing that one and the same law should regulate the whole of it, so that it should receive its full effect, just because the contract is meant effectively to reconcile their opposing relations. Apparently, then, it is said, there is no course left but to assume the law of the place of the contract as regulative.<sup>20</sup>

Against this argument we have, in the first place, to remark that in the law of obligation there are considerations other than the will of the parties. Besides that, however, this train of reasoning not being able to discover a law common to both parties, and desired by both, substitutes therefor a law which neither desires, since every person declares his will in conformity with the laws which are known to him—that is, the laws of his domicile. Instead of the real contract of the parties, then, it substitutes an imaginary contract.

On the other hand, the difficulty can be simply solved by the following considerations. Every bilateral transaction may be resolved into two unilateral obligations—sale, for example, into the obligation of the seller to deliver the thing, and the obligation of the buyer to pay the price; and indeed it was customary among the Romans to conclude bilateral obligations in the form of two unilateral stipulations.<sup>21</sup> Both seller and buyer give each other such performance as may be prescribed by the law of the domiciles of the one and of the other respectively. That is what each has promised, and this promise the other party can only have understood in the sense of the law of the domicile of him who promised, because the assumption that every man declares himself in the sense of the law which he knows, is founded on considerations of general applicability and of good sense. But if the laws of the different domiciles give a discrepant result—if, for instance, in the case put the law of the buyer's domicile throws upon him the risk of the subject sold, while the law of the seller throws it upon him, a contradiction seems to arise. We have, however, precisely the same difficulty if two express provisions at variance with

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<sup>20</sup> Merlin, *Rép.* Vo. loi; Fœlix, i. p. 227; Wachter, ii. p. 44.

<sup>21</sup> Cf. Savigny, § 369; Guthrie, p. 195; and Wachter, ii. p. 45.

each other find their way into a contract, and no interpretation sought from other circumstances can give exclusive validity to the one or to the other. The decision must be in favour of the defender, since the pursuer has certainly not made out his case. In the case of an agreement by letters, or if the place of the conclusion of the contract cannot be ascertained, those who regard the place of the contract as regulative have no resource left except to fall back upon the law of the domicile of both parties.<sup>22</sup> An objection to the application of the laws of the different domiciles seems to lie in this, that one party might often be entitled to demand performance, while he himself was not bound at all. But in every contract the undertaking of the one party depends upon that of the other: the one has only bound himself in so far as the other is bound to carry out his undertaking. He can therefore, if he is called upon to do his part, demand that the other party shall either do his first (if this is sufficient, as it often is, to bar any subsequent challenge of the transaction), or bind himself in some way that is recognised by the law of his domicile. If, however, the party who is truly bound has already performed his part, and if, by the law of the domicile of the other party, it is not enough to set up the contract that performance so made has been accepted, then all that is left is an action to recover what has passed.<sup>23</sup> (*Condictio indebiti sine causa* in Roman law.)

That the *lex domicilii* of the debtor is always to be the ruling principle, without any exception, cannot be affirmed.

In the first place, the provisions of the law of obligation often rest upon the consideration of circumstances that are purely local. If it was proposed to apply these provisions uniformly to the contracts of subjects into which they had entered in a foreign country, and which were to be performed abroad, the purpose of the legislature in making these provisions would be far overstepped, and natives living for

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<sup>22</sup> Cf. Story, § 284. Judgment of the Court of Appeal from the Rhine Provinces at Berlin, 21st September, 1831 (Volkmar, p. 141).

<sup>23</sup> There is an analogous case in Roman law, where a person contracts with a pupil without the sanction of his guardian. The guardian can take up or reject the contract, but cannot enforce the undertaking in his ward's favour without recognising the obligation undertaken by him.—Savigny, iii. p. 40.

a time abroad would find it very difficult, and often impossible, to carry on trade and commerce. No one, for instance, would hold that a tax imposed upon the sale of particular articles of subsistence in one country should be leviable in the case of these goods being sold in a foreign market by a native of the former country. The like, too, must in reason hold good of limitations on the rate of interest. If, in some foreign country where a subject of this country has an estate or a trading house, a higher rate of interest than ours is allowed and is in use, by reason that capital is more scarce, or the security is not so good, then the foreign lender with whose money the estate has been improved, or the trading concern extended, is entitled, even in our courts, to demand his higher rate of interest as was arranged. The restrictions on the rate of interest are local taxes upon the price of money. The opposite theory, instead of benefiting our citizens, would destroy their credit, since the foreign judge would certainly pay no attention to our law upon this head.<sup>24</sup> It is of much more consequence whether the money lent has been expended here or abroad. In the first case, the local limitations upon interest receive effect, but not in the second, for the interest is the price paid for the leave to spend the

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<sup>24</sup> Cf. Stephen, ii. p. 82. He says, in reference to the limitation of the rate of interest: "The statutory prohibitions, it will be observed, have always been confined to English transactions, for *if a contract which carries interest be made in a foreign country, our courts will direct the payment of interest according to the law of that country in which the contract was made. Thus Irish, American, Turkish, and Indian interest have been allowed in our courts to the amount of even 12 per cent. (though by Statute 13 Geo. III. cap. 63, § 30, British subjects in the East Indies are prohibited from taking more than 12 per cent.), for the moderation or exorbitance of interest depends on local circumstances, and the refusal to enforce such contracts would put a stop to all foreign trade.* And by Statute 12 Geo. III., cap. 79; and Geo. IV., cap. 47, all mortgages or securities for money lent of lands, tenements, or hereditaments in Ireland or the West India Colonies, bearing interest above 5 per cent., but not above what is allowed by the law of the place, shall be valid although executed in Great Britain, and whether the interest be made payable in Great Britain or in the country where the property is situate." The words in italics are quoted from Blackstone. In this we have the express testimony of a system of law much concerned with the interests of commerce, to the effect that native rules of law are not to be applied even to the subjects of that country themselves. Cf., too, *infra*, § 71.

money. Thus too it is the law of the foreign country as to interest, and not ours, that decides a question where one native of this country lends another a sum for the improvement of an estate in a foreign country. On the other hand, our law on the subject must be applied if a foreigner lends one of our subjects money for the improvement of an estate in this country, or for the extension of a business carried on here. It is plain what an advantage this theory has over that which rests upon purely external characteristics, by which the law of the place of performance or of the execution of the contract is applied in every case. The application of our laws is fully ensured, while they are not allowed to hamper foreign trade by their interference. Our task will partly consist in testing the different rules of law, with a view to determining whether they rest upon local considerations such as we have mentioned, and what these considerations are.

In the second place—and here we shall find the second part of the task furnished for us by the law of obligation—it is among all civilised peoples of the present day a rule of the law of obligations, that all such relations are to be determined in the ultimate resort by *bona fides*; even in such a case as the law of bills, where apparently considerations of strict law decide, this very strictness, which protects the person who has acquired his rights *bona fide* by means of the *litera scripta*, rests upon the principle that every one may rely upon this *litera scripta* without having to fear the many objections that may be taken by the debtor. In cases, then, where the application of the law recognised at the domicile of the debtor would do violence to *bona fides*, while other local laws would indubitably support it, then the latter and not the former is the law which, by the unanimous voice of all systems of legislation, must decide. We have already seen that no trade could go on at fairs, markets, or on exchanges, if both parties could appeal to the law of their domiciles to regulate the ordinary contracts of these markets, &c. The difference in the laws which prevail at the domicile of this or that seller would make it impossible for a buyer to determine which offer was the more favourable, taking into account the possible loss or deterioration of the goods, as well as the time allowed for payment and delivery. Commerce demands that

there shall be one law that shall necessarily determine the import of all contracts for all buyers and sellers alike, and the only possible one in such cases is the law of the place where the contract was concluded.<sup>25</sup> If appeal is made to another law, violence is done to the principle of *bona fides*. The following cases may serve as illustrations: A person owns a trading establishment abroad; he cannot suppose that the law of his domicile can be applied to contracts concluded abroad in connection with that establishment. Another contracts debts for his subsistence abroad, or opens an hotel; he cannot avoid liability by an appeal to the law of his domicile. Another delivers goods abroad to a railway company for carriage; the law that is recognised in the country where the railway is situated determines the meaning of the contract of freight.<sup>26</sup> The managers of a railway cannot make different contracts with each individual, according to his caprice or his probable intention. A person who uses the railway in the ordinary manner must be subject to the law that is recognised at the place where it is situated. In this connection the place of performance, too, is of importance. In the first place, it has to be ascertained whether the whole transaction, from its nature, must be developed and carried out where it was entered upon. If, without special agree-

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<sup>25</sup> Cf. a judgment of the Supreme Court at Berlin of the 26th September 1849. "Contracts made by our subjects abroad, which are to be put in force in this country, will, in ordinary circumstances, lead us to the conclusion that the parties meant to subject themselves to the law of this country. But this conclusion cannot be drawn in the case of contracts as to moveables, which are at once performed by both parties, as, for instance, a bargain concluded and carried out as to the sale of cattle in a foreign cattle market"—(*Entscheidungen*, vol. 18, p. 150). A bargain made at the market, which does not rank among those ordinarily made there, is to be otherwise judged of, *e.g.*, a contract for the sale of an estate, which is accidentally made at the market. It is of no moment that the parties who make the contract during the fair or market, and within the territory to which it belongs, are subjects of the same foreign State.—Judgment of the Supreme Court at Berlin, 3rd April 1856 (*Striethorst*, 20, p. 303).

<sup>26</sup> Judgment of the Supreme Court at Berlin on 12th October 1852 (*Entscheidungen*, vol. 24, pp. 21-2). "The contract relations of a railway which is exclusively Prussian, and has received goods to be forwarded, these goods having been handed on to a foreign railway, and carried farther by them, are, in questions with the sender, determined by Prussian law."

ment, performance must take place where the contract was concluded, then, as a general rule, the whole transaction belongs to the law of that country, whereas the local law of the contract is not to be displaced by selecting some other place of performance purely at random.<sup>27</sup> In the same way, the choice of a particular place of performance will regulate the obligation, if a prohibitive law stands in its way upon the spot,<sup>28</sup> or in so far as the will of the parties pronounces indirectly in favour of attaching to the performance modifications provided by the law of the place of performance. The latter<sup>29</sup> is the case where a certain sum of money is promised, to which a different value is attached at the place where the contract is concluded from that obtaining at the place of payment; or if a contract bears to be for delivery of a certain quantity, expressed according to a measure or weight, to which different meanings are given at different places. Payment will be made, or the goods measured or weighed out, as a rule, at the place of performance, according to the currency or the measures or weights in use there; and this justifies the understanding that parties, when they concluded their contract, had no other currency, measure, or weight in view. If, for instance, a bill is drawn in Ireland upon London for £100, the holder of the bill is entitled to demand £100 in English currency.<sup>30</sup> But this rule is not to

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<sup>27</sup> On this point no general rules can be given,—it depends on circumstances. Cf. Judgment of the Supreme Court at Berlin, 17th January 1856 (Striethorst, 19, p. 284); Judgment of the Supreme Court of Appeal at Jena, 1832 (Seuffert, 2, p. 162); Story, § 293 *a*.

<sup>28</sup> See on this point the following paragraph.

<sup>29</sup> Draft of a general code for German commerce, Art. 327,—“If the time of performance is said to be spring or autumn, or the like, then the usage of trade at the place of performance rules.” Art. 336,—“Measure, weight, standard of coinage, coinage, measure of time and distance, recognised at the place of performance are, in doubt, to be held as regulating the contract. Cf., too, Art. 352. Art. 353,—“If, in making the bargain, the market price or the price of the exchange is fixed as the price, then, in doubt, the current price at the time and at the place of performance, or the trade centre that determines prices for that place, is to be thereby understood.” Cf. Art. 569 as to the time for loading vessels. (The regulations of the port, or, failing them, the usage of the place is to rule.)

<sup>30</sup> Burge, iii. p. 772; Wheaton, i. § 145, p. 194; P. Voet, 9, 2, No. 12; Story, § 272 *a*; Burgundus, iv. 27-9; J. Voet in Dig. 12, 1, § 25; Christianæus, i.



be applied if, from the circumstances, we may infer that parties had in the particular case some other end in view. For instance, if a loan is made in Ireland in Irish currency, and London is fixed upon as the place of repayment, the debtor has only to refund £100 Irish currency, since the essence of such a contract is that the debtor has, putting interest out of the question, only a duty to repay what he got. If, to take another illustration, in a contract of sale, the currency of the place of payment would give either an unreasonably high or a disproportionately low price for the goods, while the currency of the place where the contract was concluded would give an ordinary price, it cannot be assumed that parties have had the former in view.

In contracts affecting immoveables, performance can only take place, on the part of the person giving a permanent or temporary right over such property, at the place where the thing is. Setting aside the consideration that performance is in this way always subject to the prohibitive laws in force at the place where the thing is, and that real rights in immoveables can only be given in the forms of the *lex rei sitæ*, and, therefore, that there is from the first a reference to that law, the person who acquires a right of use, or a personal claim to the use of a parcel of property, generally contemplates taking up a permanent residence in the place where the thing is, and at the same time we may assume that both the disponent and the possessor are acquainted with the *lex rei sitæ*.

In doubt, then, contracts as to landed property must be interpreted in accordance with the *lex rei sitæ*,<sup>31</sup> although the circumstances of a particular case may lead to a different

decis. 285, Nos. 5-11; Boullenois, ii. p. 500-1; Gand, No. 295; Fœlix, i. p. 232; Pardessus, No. 1495; Massé, ii. No. 119-126; Judgment of the Supreme Court of Appeal at Lübeck in the year 1853 (Seuffert, 8, p. 5); Austrian General Code, Art. 905, *ad fin.*—"In considering weights, measures, and currency, the place of delivery must be regarded." [Cf. *Ainslie v. Murrays*, 17th March, 1881, 8 R. 636.]

<sup>31</sup> Fœlix, i. p. 232. Massé, No. 97. Boullenois, i. p. 554; ii. pp. 453, 497. Burge, ii. pp. 858, 859, 871. Choppin, *Opera de feud.* Andegav. ii. lib. 2, tit. 3, No. 10. J. Voet in Dig. 46, 3, No. 8. Harum in *Haimerl's Magazin für Oesterreichische Rechtswissenschaft*, ii. p. 396. Story, § 271, *ad fin.*

result,<sup>32 33</sup> which accounts for the opinions which some authors have adopted at variance with ours.<sup>34</sup>

Obligations arising from delicts, and from circumstances of a kindred nature, furnish a general exception to the universal application of the *lex domicilii* to the import of obligations. The obligation arising from a delict may have as its subject—1st, reparation for the damage done, and 2nd, a penalty to be paid to the injured person.

As far as regards these obligations under the first head, the rules of law in reference to them contain no more than such instructions as every one, who lives in the State where they are in force, must observe in his dealings with other persons and things that happen to be there. It is obvious that by failing in this responsibility, the foreigner becomes subject to these laws,<sup>35</sup> and as every State requires this submission of the citizen of other States in its territory, it must always recognise the same submission of its own subjects to a foreign state. The law of the place where the prejudicial act was done, or the prejudicial circumstances happened, decides the obligation to make reparation.<sup>36</sup>

These obligations, so far as they fall under the second head, belong essentially to criminal law; the difference between them and the obligations to pay penalties, which are, as a rule, assigned to public law, is simply this, that in the case of the latter, the fine goes to the public purse, in the case of the

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<sup>32</sup> Molinæus in L. 1, C. de S. Trin.,—"Unde stantibus mensuris diversis si fundus venditur ad mensuram vel affirmatur vel mensuratur, non continuo debet inspicere mensura quæ regit in loco contractus, sed in dubio debet attendi mensura loci in quo fundus debet metiri et tradi et executio fieri. Et ita tenendum, nisi ex aliis circumstantiis constet, de qua mensura senserint." Molinæus has a different theory as to warrandice.

<sup>33</sup> Cf. Judgment of the Supreme Court of Appeal at Wiesbaden of 5th February, 1825 (Nahmer Coll. 2, p. 219), where it was held that a contract of lease concluded by a subject of Nassau, in Mainz, was to be determined by French law, which rules in Mainz.

<sup>34</sup> See *supra*, pp. 132 and 233, as to the form of contracts relating to immoveables.

<sup>35</sup> Foreigners would, if it were otherwise, have privileges which would often be impossible to reconcile with common feelings of justice and the security of intercourse.

<sup>36</sup> For further development of this, and a refutation of the theories that differ from it, see *infra*, § 88.

former, to a private person. Both punishments, however, rest upon moral or political grounds, and therefore the *lex fori* decides in such cases, just as it does in cases where public criminal statutes are transgressed; but if the act has no punishment attached to it at the place where it was done, no punishment can be imposed upon it abroad; for if it could, then the native laws of one country would claim to be observed in a foreign land, a demand inconsistent with the principle of territorial sovereignty,—viz., that every State has the privilege of determining all questions as to the conduct of persons who stay in its territory, in their relations with other persons and with things that are in the same territory, and all questions as to their freedom of action (cf. Fœlix, ii. p. 319). The character of the obligation as one belonging to private law has merely this effect, that no claim can ever be advanced to a sum in excess of what the *lex loci actus* approves. For the accidental circumstance that the claim is dependent upon the decision of another court can never enlarge the amount of that claim after it has been once fixed.<sup>37</sup>

If we must concede that the law of the place where the obligation originates and is to be performed has no unimportant bearing on the import of obligations, there are, on the other hand, rules of law as to the dissolution of obligations that have been constituted, which demand an unqualified application, according to the rules of the *lex domicilii* of the debtor; as in the case of the total or partial dissolution of obligations by limitations of action, and the release which in some systems of law is in certain circumstances given to the debtor in the event of his bankruptcy. If, again, the object of a particular rule of law can only be attained by leaving the *lex loci contractus* or the law of the place of performance out of sight, then the *judex domicilii* has the duty laid upon him of applying his own law without exception. We shall see that there are sufficient grounds to be urged for the recognition of the debtor's freedom by the foreign judge also.

The law of the place of action, *lex fori*, must also be kept in view to this effect, that the judge, as has already been noted in setting forth our general principles, can never recog-

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<sup>37</sup> Cf. *infra*, § 88, and criminal law.

nise a claim which the ideas of his own law pronounce to be immoral or indecent.

With these modifications, no one can urge against the view we have adopted that it, no doubt, fits the case where the *judex domicilii* of the debtor is competent, but is not adapted to give rules for decision to another judge, *e.g.*, the *judex loci contractus* or the *judex domicilii creditoris*, who have nothing to do with the protection of the person of the debtor. If we have excluded the purely local provisions of statutes recognised only at the place of his domicile, and, from consideration for *bona fides* and what may be presumed to be the intention of parties, have allowed the law of the place where the contract is concluded or is to be performed to have its operation, we have done enough to secure the intercourse of our subjects with foreigners ; for no one can be disappointed in any well-founded expectation (*bona fides*) that his own law will be applied to relations of obligation entered into with foreigners: this our limitations have ensured ; and if they are not applicable in any particular case, the foreign judge is all the more under obligation to recognise the *lex domicilii* of the debtor, since, if he were in every case to apply the *lex loci contractus* or the law of the place of performance, then, as we have seen, he could never succeed in having the law of his own country observed abroad. We undertake to show in the sequel that, where practice and the most approved authorities take the law of the place where the contract is made or is to be performed as their principle, our view, too, leads as certainly to that result, without carrying with it the inevitable consequences, prejudicial to all sense of justice and equity, which accompany the uniform application either of the law of the place of the performance, or of the place where the contract is made.<sup>38</sup>

If objection shall be taken to the principles laid down by us, because they are capable of various meanings, and so leave scope for capricious interpretations, we may answer by pointing to the impossibility of expressing fully in any code, or for one particular positive law, the principles of *bona fides* which govern the law of obligations. The cases, for instance,

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<sup>38</sup> Cf., too, *infra*, § 120, the discussion on the *forum contractus*.

which the rich casuistry of Justinian's Pandects exhibits are mere illustrations which, by analogy, the lawyer may apply to the endless multiplicity of relations of obligation. We have less right to require of a system of international law what cannot be attained even for a particular system of positive law. If the questions which have hitherto supplied the most important material for questions of international obligation are discussed by us in such a way that those other questions, on which we shall not bestow particular attention, may be determined from the analogy of those that are fully dealt with, then we may fairly consider that our task is complete, because the rest may be left to judicial determination in each case as it arises.<sup>39</sup>

*B. OBLIGATIONS ex contractu.*

- (1.) SUBJECT OF THE OBLIGATION. PERMISSIBILITY OF THE TRANSACTION. (EVASION OF FOREIGN REVENUE LAWS. GAMING IN FOREIGN LOTTERIES.)

§ 67.

It is a general requirement of every contract-obligation that the act of the debtor, to which the obligation is directed, should be permissible.<sup>1</sup> On this point the laws of the different places, which have to be considered in every obligation, may differ.

According to the prevailing theory, the obligation is invalid if the act is forbidden by the law of the place of performance.<sup>2</sup>

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<sup>39</sup> Cf. too, Story (§ 241) who, although he sets up the place of the contract of performance for himself, still practically ends in the result we have come to in the text. The artificial rules given by Boullenois, ii. pp. 458, 459; and Fœlix, i. § 70, pp. 157-58 (cf. p. 223), which are in part inconsistent with one another, and in part are entirely destitute of foundation, show how little success has really attended the effort to discover more definite principles for the law of obligations.

<sup>1</sup> The purely logical essentials of an obligation,—*e.g.*, that the act should be possible, the subject of the obligation not quite indefinite (cf. Arndt's Pandects, § 202 *et seq.*)—are not here treated of, because they are to be found in every system of legislation.

<sup>2</sup> Cf. Günther, p. 740; Massé, ii. p. 116; Wheaton, p. 116; Wächter, ii. p. 404; Story, § 246; Huber, i. 3, § 5; Mittermaier, i. § 31, note 9. It

In the first place, it is plain that the judge of the country in which the obligation is to be performed must regard it as void. The same, however, is true of the judges of other countries. Every State has the right to forbid certain transactions within its territory, be these undertaken by natives or by foreigners. The judge who by his decree compels the debtor to performance of an act which runs counter to such a law does violence to the law of the State in which the act is to be performed.<sup>3</sup>

It has, however, been proposed to make an exception in the case of prohibitions which rest upon purely fiscal grounds. The most important case of this kind is to be found in the case of smuggling or evasion of foreign duties. In this case, it is said, the judges of other States should regard the transaction as valid. States, says Pardessus,<sup>4</sup> live, as far as their revenue laws are concerned, in a kind of war with each other; and older authors, such as Emérigon<sup>5</sup> and Straccha,<sup>6</sup> express themselves to the same effect. This ground, however, may justify retaliation, but can never justify the principle itself of refusing recognition to the revenue laws of other States; for, as Vattel remarks,<sup>7</sup> every sovereign has the right of limiting the import or export of particular goods, without thereby giving other States, who claim the same right for themselves, any ground to complain. It comes to this, that it can hardly ever be possible to transgress foreign revenue laws without deceiving the officers of that Government—a proceeding which can never be regarded as creditable. An obligation which requires such a deception needs no more to

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will be understood that all authors who make the place of performance the rule in every case are to be reckoned here.

<sup>3</sup> *Fœlix*, i. §§ 78, 99, pp. 158, 235. The question is often mixed up with the case to be discussed below—viz., where the transaction itself is forbidden, but not the act which is the immediate subject of the obligation, *e.g.*, where a gaming contract is forbidden, but not the payment of the sum which is the subject of that contract.

<sup>4</sup> No. 1492.

<sup>5</sup> I. ch. 8. No. 58.

<sup>6</sup> *De assicurat.* gl. 5, No. 5; *Massé*, ii. p. 116, and *Wheaton*, § 91, p. 122, take the same view. The older practice in France, according to Emérigon, as well as in England and America, is to the same effect. Cf. *Story*, § 245.

<sup>7</sup> I. ch. 8, § 90.

show it to be necessarily regarded as invalid. But as a matter of fact, there are writers of repute who maintain this view.<sup>8</sup>

The sale of foreign lottery tickets is to be determined on the same principles, if it is always kept in mind that it is only the advertisement and sale of such tickets within our own territory that can in reason become the subject of any such interdiction: sale and advertisement in another country cannot, and therefore, if the transaction of sale were a permissible transaction according to the law of the country where it took place, an action for payment of the price must be entertained by our Courts (Story, § 258a, Günther, p. 740). A judgment of the Supreme Court of Berlin of 16th October,

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<sup>8</sup> Pothier, des assurances, No. 59; Story, §§ 245-257. According to Story's and Massé's notes, the English authors Marshall and Chitty, and the French jurist Delangle adopt the same theory. Pfeiffer, Prakt. Ausführ. iii. p. 85. Mohl. (Staatsrecht, Völkerrecht, i. pp. 724-5) refutes at the same time the view that the State which favours contraventions of foreign revenue laws has any permanent advantages to expect from it: "Revenue laws are an essential means of compelling all classes of subjects to contribute to the burdens of the State; and, therefore, the maintenance of manifold rights and privileges which every State is bound most completely to ensure to its subjects is dependent upon their observance." At the least, as Mohl remarks, the opposite view must be rested upon the belief that advantage may somehow be drawn from this system of smuggling. By the same reasoning, theft, robbery, murder, and swindling in a foreign country will be supported. See the judgment of the Supreme Court of Cassel of 13th December, 1828, reported by Pfeiffer, pp. 85-6, which pronounced for the nullity of a contract directed to the evasion of foreign revenue laws, as being intended to withdraw from the State in question a right founded on law; and the fact that the Courts of Hesse had no jurisdiction to impose punishment in such cases could not be decisive. The case of a contract directed not merely to smuggling, but also to the corruption of the foreign officials, is beside the question. Massé, ii., No. 83, "*La corruption quelque soit le but qu'elle se propose étant contraire aux principes de morale universelle. . . . C'est ce qui a été jugé par un decret de la Cour royale de Pau du 11 Juillet, 1834.*" The question whether a transaction has for its object the evasion of revenue laws does not belong to International Law; it is to be determined by the actual circumstances of the particular case, and this is a solution of the variety of the judgments reported by Story, § 251. In one case the transaction was not declared void, although the person who sold the goods knew that they were to be smuggled, because it was necessary, in order to produce that legal result, that the smuggling of the goods should form part of the contract, or that the seller should himself contribute in some way to the smuggling, e.g., by packing the goods in some special way. In the other case the contrary was found.

1854, proceeded on the ground, that the question whether or not the transaction was permissible must in a Prussian Court be determined by Prussian law ; and the pleas of the defenders,—who were domiciled in Prussia, and had sold to the pursuer, who was domiciled in Bohemia, tickets in a marine lottery for Prussia—that they were free from liability, because in Austria the sale and purchase of Prussian lottery tickets was forbidden, were repelled. The following case may be distinguished. If it is merely the collection for foreign lotteries that is forbidden, then in the country of the person who takes a share, action at the instance of the collector against him is no doubt excluded, but action at the instance of the ticket-holder against the collector is not forbidden either there or in the country where the lottery is permissible ; for in neither of the legal systems coming under consideration is there any intention to put the ticket-holder at a disadvantage. This result is in harmony with the case cited, as well as with a judgment of the Supreme Court of Appeal at Lübeck<sup>9</sup> ; with the grounds of the decision in that case, however, I have very little sympathy, nor have I for those of the Court at Berlin. The matter would stand otherwise if, as is enacted by the Hanoverian Ordinance of 19th April, 1819,<sup>10</sup> in relation to the “Lotto” (in contrast with the ordinary lottery), all winnings were declared forfeited by way of punishment.

When the transaction is forbidden by the law of the domicile of one of the parties, this law is not to be considered, since police regulations do not bind the subjects of a country abroad.

The law of the place of action, however, rules in so far as

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<sup>9</sup> Of the 11th December, 1849 (Römer's Collection, ii. pp. 158-60), “Foreign Laws forbidding gaming in lotteries in other countries, are not to be applied by the Courts of Frankfort, as the Frankfort lottery is a financial institution of the State ; and it cannot, therefore, be held that the legislators of Frankfort intended to give to courts of that place power to apply such laws. If a collector has invited a foreigner to game in the lottery, knowing that that was forbidden by the law of his country, he cannot appeal to these foreign laws, so as to escape payment, if the foreigner wins ; this plea will be repelled by the *Replica doli*, recognised in the cases of *Laubinger v. Schnabel*, 1835 ; *Cloncurry v. Ueberfeld* (1848).

<sup>10</sup> Official Gesetzsaml. 1819, Part I. p. 25.



a judge cannot enforce a transaction which, by the law of the land, is to be held immoral, even although the same may have been entered into abroad.

## (2.) CONDITIONS OF THE VALIDITY OF CONTRACTS, AND THEIR FORCE IN JUDGMENT.

### § 68.

The validity of contracts and their force in judgment may depend upon the observance of a particular form. We have already remarked, in discussing the rule "*Locus regit actum*," that the transaction in such a case must be recognised generally as valid and good in judgment, if it corresponds with the forms recognised at the place where it was entered into.<sup>1</sup> If, then, informal contracts are generally recognised in any country, then an informal contract concluded there may be pleaded in judgment in any other country, although according to the law of that second country such a contract would only create an obligation on which no action could be raised. Whether, again, it will be enough that the transaction, as regards its form, is in accordance with the law of some other country, will depend upon what laws govern it as regards its substance. For it may be laid down that the same laws to which the essence and import of the transaction are subject, will and should regulate the form of the same, since its form is simply the outward token of its essence and import. Besides that, however, the purpose of the parties to bind themselves by a valid contract must be evident.<sup>2</sup> This consideration will show that there can seldom be a binding contract, if in the form of the contract the *lex loci contractus* is not observed.<sup>3</sup>

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<sup>1</sup> Mevius in Jus. Lub. proleg. 4, No. 116, "*Cave autem in hac materia confundas actuum et contractuum sollemnitates, nec non effectus.*"

<sup>2</sup> Cf. Oesterr. Allgem. G. B., Art. 36-7; Püttlingen, p. 49.

<sup>3</sup> Cf. on this subject *supra*, § 36. [A contract of marriage executed between two French subjects in Brazil, where both were at the time residing, the husband being engaged in business there, will not be rejected by the French courts because it has not been published as French law requires, but will receive effect as a French contract, the parties having executed it as

If the transaction is forbidden by the law of the place where it is entered into, then there can be no form recognised by the *lex loci contractus* by which it may be validly concluded. Thus, all such contracts must, as a rule, be pronounced null, unless for this exceptional case it is sufficient to observe the form imposed by the law of some other territory. For instance, according to the penal code of France,<sup>4</sup> a sale for delivery of public funds is invalid if at the time of concluding the contract the scrip is not in the possession of the seller. A contract of this kind, therefore, concluded on the exchange at Paris in contravention of this provision is, as a rule, to be held null everywhere. But if two persons domiciled in another country conclude a bargain of this kind in a railway carriage while they are in some territory where French law prevails, then either party may bring an action for compelling performance before the *judex domicilii*, if the law of the domicile of these parties knows no such restriction,<sup>5</sup> and if their intention clearly was directed to the execution of a binding contract.<sup>6</sup> The same rules will decide if, for instance, one makes some stipulation in Vienna contrary to the provisions of the 879th section of the general code of Austria.<sup>7</sup>

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nearly as possible in the French form, and, to secure publication as far as possible, having registered it in the nearest French consulate. *Guitton v. Russel*, Rennes, 4th March, 1880.]

<sup>4</sup> Art. 421-2 ; cf. Gand, No. 688.

<sup>5</sup> Boullenois, ii. pp. 456, 489, 490. Story, § 273, remarks, "without undertaking to say that the exception may not be well founded in particular cases, as to persons merely *in transitu*, it may unhesitatingly be said that nothing but the clearest intention on the part of foreigners to act upon their own domestic law, in exclusion of the law of the place of contract, ought to change the application of the general rule."

<sup>6</sup> Such exceptional cases are generally overlooked, if one argues with Huber, in confl. § 3 : "*E contra negotia et acta certo loco contra leges ejus loci celebrata, quum sint ab initio invalida, nusquam valere possunt.*" The reason "*quum sint ab initio invalida*" contains a *petitio principii* : it assumes, what is not proved and cannot be proved, that every transaction is to be determined by the *lex loci contractus*. Story, § 243, says of contracts, "If void or illegal by the law of the place, they are generally held void and illegal everywhere." He maintains it is a principle of the law of nature ; such a law however does not exist.

<sup>7</sup> § 879, "In particular, the following contracts are invalid—viz., 1st, If any condition shall be laid upon the undertaking of a contract of marriage."

The question whether an obligation can or can not be sued upon undoubtedly belongs to the substance of the contract, and is therefore independent of the law recognised at the seat of the court.<sup>8</sup> But if an action arising out of the particular legal relation is held in our country to be immoral, or indecent, it must be thrown out without respect to the law of the place where the contract was made or where it is to be performed, or to that of the domicile of the parties.<sup>9</sup> These cases, and such cases as those in which some legal relation cannot be sued upon for want of a prescribed form—*e.g.*, where action cannot be maintained for more than a certain sum except upon a written document—have been so mixed up<sup>10</sup> as to have led to the very general adoption of the view that where a transaction or contract cannot be sued upon in some particular country, no action at all arising out of it can be maintained there, although it was concluded and is to be performed in another country, and both parties are foreigners.<sup>11</sup> If the law restricts the judicial operation of particular obligations, that provision no doubt implies that the judge is bound to throw out any action of the kind, in spite of the desire of the parties that the transaction should be upheld. If then, for instance, an action is brought upon a guarantee by a wife for her husband, a forbidden transaction, the judge must necessarily dismiss it. But that does not settle the question whether the law means to deal with all such cautionary obligations, wherever and by whomsoever they may be undertaken, or only with those undertaken by married women of its own country and bonds which are to receive effect there.<sup>12</sup> The

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<sup>8</sup> Seuffert, *Comm. i.* p. 160, note 78; *Fœlix, i.* § 110, p. 255; *Wächter, i.* p. 270; *ii.* p. 26, and 400.

<sup>9</sup> If, for instance, at the place of action gambling debts cannot constitute a ground of action. *Savigny*, § 374; *Guthrie*, p. 252.

<sup>10</sup> *E.g.* "*La recherche de la paternité est interdite*, *Code civ.*, art. 340; or the provision of the Austrian Code cited in note 4; or the contracts cited by *Story*, § 258, in encouragement of prostitution, or for the circulation of indecent books or pictures, if these contracts are concluded in a foreign country.

<sup>11</sup> So, for instance, *Weber* on natural obligations, § 62; and *Linde*, *Hand-book of German Civil Process*, § 41, note 3.

<sup>12</sup> See *Brinckmann, i.* p. 16, for argument of faculty of law at Kiel.

theory which holds that the *lex fori* must always determine whether action can lie or not, leads necessarily to this, that more favour is shown to a transaction which is entirely void, than to one which is valid in itself, but on which no action can be brought.<sup>13</sup>

### (3.) IMPORT OF OBLIGATIONS.

#### § 69.

Within certain limits the import of an obligation depends on the declaration of the intention of the parties. But yet it would not be correct to say that the import of an obligatory contract is merely that which may be presumed to be their intention. The so-called dispositive rules of law which belong to this subject may, no doubt, be excluded by the will of the parties ; but it is by no means the case that they are to be applied only where they correspond with what was probably the intention of the parties.<sup>1</sup> If this were true, these rules would be excluded in every case where one could not point to some declaration of intention, perhaps a tacit declaration, by the parties that they should be applied. It is upon a confusion between the presumed intention of the parties and these so-called dispositive rules of law that the theory of those authors rests,<sup>2</sup> who say that the immediate consequences of a contract are to be determined by the *lex loci contractus*, while its indirect or accidental consequences must be ruled by the laws of the country where these consequences may have taken place. For instance, it is said that among the immediate consequences of a contract of sale are the delivery of the subject sold to the buyer, the payment of the price, the right to renounce the contract on the ground of enorm lesion, and the passing of the risk to the buyer ; while among the accidental consequences are unwarrantable delay on the part of any of the contracting parties, or the renunciation of the contract by reason of the occurrence of some

<sup>13</sup> Wächter, ii. p. 402 ; Demangeat on Fœlix, i. p. 255, note a.

<sup>1</sup> Thöl, § 44, ii.

<sup>2</sup> *E.g.*, Fœlix, i. p. 247, and note i.

subsequent event.<sup>3</sup> The former are results that can be foreseen, the latter cannot. But the whole theory must be rejected, for the very reason that it is only the particular capacity and prudence of individuals that can determine what is unforeseen. It is difficult to understand, as a matter of fact, why there should be any greater difficulty in foreseeing a delay in performance, than in foreseeing the accidental destruction of the subject, and indeed it may very well be that if the buyer had a reputation for dilatoriness, the question of the time of payment should belong to the category of things foreseen.

Further, it is an error to determine objections which may be taken to the validity of a contract by the law that is recognised at the seat of the court, instead of by the law under which the contract itself falls.<sup>4</sup> No doubt there may be objections which are rested on considerations of the forms of process, and there the *lex fori* will decide: but it is different with objections depending on material grounds—they determine up to what point the validity of an obligation may be carried, and can therefore be decided by no other law than the local law, which for other purposes determines the validity of the obligation.<sup>5</sup>

#### (4.) PAYMENT OF MONEY.

#### § 70.

We have already noted, in discussing the general principles of the law of obligations, that in cases of doubt the coinage recognised at the place of payment must be taken to be the proper medium of payment.<sup>1</sup> We need only mention one point in this connection which is much controverted, especially in the judgments of English and American courts.

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<sup>3</sup> Fœlix, i. p. 249 *et seq.* § 109. See, on the other hand, Rocco, p. 319, after the quotation in Mittermaier; *Zeitschrift für Rechtsw. des Auslandes* xi. p. 281.

<sup>4</sup> Cf. Fœlix, i. p. 237, § 100. [Cf. case of *Benton v. Horeau*, C. de Cass., *supra*, p. 143.]

<sup>5</sup> Savigny, § 374; Guthrie, p. 247; Demangeat, in note to Fœlix, *sup. cit.*; Story, § 330.

<sup>1</sup> In contracts as to landed property, circumstances will frequently compel recourse to be had to the currency of the law of the place where the subject is. See *supra*, § 66, note 26.

Suppose that a debtor, who is bound to pay a certain sum at a particular place, is asked for payment at some other place, is the sum to be determined by the nominal or statutory relation which the currency of the place in which the demand is made bears to the currency of the place where payment was to be made, or is it to be determined by the rate of exchange current between these two places? For instance, action is brought in the United States for a debt of £100, nominally payable in England—by statute in the United States the pound is equal to 4 dollars 48 cents,<sup>2</sup> but the course of exchange with England gives it a higher value by 10 per cent.—is then the pursuer of the action entitled to 448 dollars, or to that sum and 10 per cent. besides? Upon this question there have been conflicting decisions in the courts. The following seems the true answer. In strictness, the creditor is not entitled to require payment to be made at any other place than that originally appointed, nor is the debtor entitled to discharge himself by tendering payment anywhere else; and, therefore, the sentence of the court must condemn the debtor to pay the sum fixed at the original place of payment according to the statutory equivalent. It might be impossible to work out such a decree at the original place of payment if the debtor had no sufficient estate there, or if the court of that country should refuse to give legal redress. If, then, the reason for not raising the action at the appointed place of payment be that the debtor has no estate there, the judgment of the court must be in such terms as will make it possible to carry it out at the place where action is brought, and, therefore, since the debtor has failed timeously to make payment at the appointed place, and must bear the consequences of that failure, the creditor will receive, in addition to the original sum, enough to pay the act of transmitting that original sum to the place where payment should have been made. If, then, the debtor wishes to pay in bills, or if there is no other way of remitting the money safely (*e.g.*, if it should be impossible to ensure the money that has to be remitted), he must make good to the creditor the difference of the exchanges in case the rate at the place of payment as compared

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<sup>2</sup> There is, however, an exception to this. Story, § 309, note 2.

with that of the place of action is above par, while in the converse case he may take credit for the difference. It may, however, be equally convenient for the creditor to receive payment at the place of action ; if in such a case he should, nevertheless, demand payment at the place originally fixed, the debtor by establishing the fact may plead the *exceptio doli*, and the creditor who has no interest to receive payment there would be satisfied with receiving so much as might be equal to the sum originally contained in the obligation according to the value set upon it by the law of the place of action. Lastly, it may absolutely be for the creditor's advantage to receive payment at the place of action ; in such a case the debtor would be entitled to deduct upon similar grounds the difference between the rates of exchange in the two places.<sup>3</sup> In the case of settlements between traders, it is generally in the interest of the creditor that payment should be made at the place arranged, and that the rate of exchange, if the payment is made by bills, should determine the amount. In such cases, however, unless there should be some statutory prohibition,<sup>4</sup> the judgment of the court can only give the pursuer the sum sued for along with the expense of transmitting it safely to the place of payment ; for the mode of payment, which may, for instance, be made by post-office order or by the remittance of specie under insurance, is left to the choice of parties until steps are taken to compel it.<sup>5</sup>

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<sup>3</sup> L., 2, pr. D., *de eo quod certo loco*, 13, 4.

<sup>4</sup> Cf. Allgem. Deutsche Wechsel Ordnung, § 57, rule 2.

<sup>5</sup> Cf. Story, § 306 *et seq.* [All that concerns payment or performance will be determined by the law of the place of payment or performance (*Treschow v. Bockelmann*, Supreme Court of Commerce of German Empire, 28th June, 1875). In an action decided in the Court of Session in Scotland (*Ainslie v. Murrays*, 17th Nov., 1881, 8 R., 636), a question was raised as to the amount due by a defender in an action in the Scottish court, which had been compromised on the footing that the defender should pay £4250, and should give the pursuer a power of attorney to sell property in Rangoon to pay this sum *pro tanto*. It was held in that case that in estimating the price obtained for the Rangoon property, which was paid in rupees, the value of the rupee in Scotland must be taken, as Scotland was the *locus solutionis*.]

## (5.) PAYMENT OF INTEREST.

## § 71

The obligation to pay interest, in so far as it rests upon special contract, depends, as we have already shown, upon the law of the country where the capital comes to be employed.<sup>1</sup> That is the result of the definition of interest: "*Usuræ vicem fructuum obtinent.*"<sup>2</sup> The capital of the creditor yields fruits when joined with property and personal exertions of the debtor; and of these fruits the creditor gets a proportionate share. It may be put in this way, that the property and the labour of the debtor are the soil in which that capital of the creditor brings forth fruit.<sup>3</sup> As a rule, this operation takes place at the domicile of the debtor, but it may also take place in some other country, if the debtor has chanced to employ the money in carrying on trade abroad, or in cultivating an estate abroad.<sup>4</sup> Statutory interest, on the other hand, is due to the operation of some other legal relation,<sup>5</sup> and is, therefore, subject to the local law to which the other legal relation belongs. For instance, the statutory interest which a buyer must, under certain circumstances, pay is subject to the same law as the contract of sale. The interest due by a guardian upon money belonging to his ward, which has not been invested at the proper time, is regulated by the law that prevails at the seat of the court which supervises the curatory;<sup>6</sup> and the interest for which a mandatary has to account to the mandant upon sums of money employed by him for his own behoof depends on the local law by which the whole relationship of the mandatary and mandant is to be judged.

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<sup>1</sup> See *supra*, §§ 267-68.

<sup>2</sup> L. 34 D.; D. *de usur.* 22, 1.

<sup>3</sup> We cannot take into account here that in many cases the capital yields no profit to the debtor. The use of money is, as a rule, profitable to the *bonus paterfamilias*, as the Roman texts say in similar cases.

<sup>4</sup> It is otherwise if a landed property should become a supplementary security for a loan advanced for other purposes, or for indefinite purposes (Burgundus, iv. No. 10).

<sup>5</sup> Hert, iv. 53; Seuffert, Comm. i. p. 254.

<sup>6</sup> See below, § 106.



Many authorities lay it down that the law of the place where the contract is made will regulate the maximum interest that can be allowed ;<sup>7</sup> others maintain that if a place of payment is specified, the laws that are in force there must rule.<sup>8</sup> These theories rest upon the assumption that the law which is to rule the obligation is simply determined by a voluntary submission of the parties. But if parties have not the power to take a foreign law at their pleasure as a rule of determination (as, for instance, two Prussians cannot at their pleasure adopt American law as the rule for a contract which they are concluding as to a subject situated in their own country),<sup>9</sup> they are just as much incapacitated from doing this indirectly by choosing at their pleasure some other country for the place of performance, or for the conclusion of the contract. And even the adherents of this theory maintain the impossibility of choosing a foreign place for the performance, or the conclusion of the contract, in order to escape from the law of the country to which the parties belong.<sup>10</sup>

The place of performance is, however, like the place of the contract, so far of importance that from it it may be inferred in what place the loan is really to be spent. *E.g.*, a native of this country contracts a loan abroad to meet the expenses of his stay there, and this loan is to be repaid during his stay abroad. The legality of the interest stipulated in this case must be determined according to the law of the foreign country.<sup>11</sup> Conversely, if one lends money abroad to one

<sup>7</sup> Cocceji, vii. 11 ; Rodenburg, iii. p. 2, c. 2, § 6 ; J. Voet, Comm. 22, 1, § 6 ; Massé, p. 176 (No. 131).

<sup>8</sup> P. Voet, c. 2, § 9, No. 12 ; Everhardus, Cons. 78, No. 24 ; Christianæus, i., decis. 283, Nos. 12, 13. Burgundus also (iv., No. 10, cf. with No. 29) belongs to this class ; and Story, § 298 ; Burge, iii. p. 774, § 304 *e.* Fœlix, i. pp. 250-3. Boullenois's view is not distinct, ii. p. 472 (cf. with ii. p. 446) ; but he, too, seems to take, in cases where a place of payment has been fixed, the law that is there recognised. Bouhier, chap. xxi., No. 194-5, takes a peculiar view. The law of the domicile of the creditor is to prevail, except in so far as he may have subjected himself to another.

<sup>9</sup> Unger, p. 180.

<sup>10</sup> J. Voet, *ad loc. cit.* : "*Modo etiam bona fide omnia gesta fuerint nec consulto talis ad mutuum contrahendum locus electus sit, in quo graviores essent, quam in loco in quo alias contrahendum fuisset, probatæ inveniuntur.*" Story, § 304.

<sup>11</sup> See, besides, § 66, note 20.

who is to keep it for a considerable time, and to continue to pay interest upon it after he has returned home, it may then be taken that the loan is to find its real application at the domicile of the debtor. Any agreement that may be made that the creditor is to receive repayment of capital and interest at his domicile, can certainly never determine<sup>12</sup> the legality of the rate of interest.<sup>13</sup>

Many authors have approved of the theory that forbids the judge to countenance any higher rate of interest than that which is sanctioned by the law of the place where the court is situated, since, according to the spirit of the laws that fix the maximum rate of interest, no judge should lend his authoritative sentence to the furtherance of any undertaking so immoral and prejudicial to public interests as an usurious contract is.<sup>14</sup>

That by foreign law, to which the transaction is subject, the creditor could have recovered the stipulated interest from any other debtor belonging to that country, and the debtor could have been forced to pay it to any other creditor, is not sufficient to disprove the correctness of this last rule, although it may raise a doubt as to whether the transaction can properly be held to be usurious. Laws against usury are intended to protect the

<sup>12</sup> The domicile of the creditor may also be of importance. If two natives of this country enter upon a contract of loan in a foreign country, it is more easily inferred that the transaction is *in fraudem legis*, or that the money is to be spent at their domicile, than it would be if the creditor were a foreigner. The term *in fraudem legis* may be fitly applied to cases in which parties, to escape from the usury laws of their own country, choose some foreign country as the place in which the contract shall be made, or shall eventually be performed. In reality, the parties, in such a case, hold their own country to be the territory to which the whole transaction belongs. A mark of this would be that the creditor cannot show any interest in having the contract performed abroad (Thöl., § 65, 2).

<sup>13</sup> Thöl., 85, note 4, holds that the *lex domicilii* of the debtor should, as a rule, prevail. This theory comes very close to our own, since in most cases the money will be spent at the debtor's domicile. [The Court of Lyons has determined that the rate of interest upon a loan will be settled by the law of the country where the contract of loan is to be executed—*i.e.*, of the country in which the debtor receives the money (Kockert, 3rd Aug., 1876.)

<sup>14</sup> Savigny, § 374; Guthrie, p. 251; Demangeat on Fœlix, i. p. 252, note on the decision of the Supreme Court at Celle, 16th September, 1852.

debtor from oppression ; but this can only come within the cognisance of the law of the place where the court is situated in cases where the borrowed money is to be spent at that place, and the maximum allowed by the law of that place is exceeded. Another reason for rejecting the theory which proposes that the *lex fori* should rule, is the fact that by the provisions of the laws of some countries a higher rate of interest is allowed in dangerous transactions and in trade loans ; while the high rate of interest prevailing in other States is often justified by the insecurity of the law of the land or the wider prevalence of speculation.<sup>15, 16</sup>

As regards penal interest for delay, many<sup>17</sup> decide in favour of the law of the place of payment, although they adopt, as a general rule, the principle that the law of the place where the contract is concluded should rule. We have already (*supra*, § 69) tried to controvert this view, which rests upon the distinction between the immediate and the accidental results of a contract. The creditor may, however, claim recompense for all the damage caused by the debtor's *mora*, and if we assume that

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<sup>15</sup> Cf. *supra*, § 66, note 24 ; Fœlix, i. p. 251, note 1 ; and Massé, p. 176. Judgment of the Royal Court of Bordeaux of 26th January, 1831 (Sirey, § 1, ii. p. 178). The grounds on which this case was decided are in favour of stipulations for interest that are good according to the law of the domicile, and of the place where the contract was made, although they are illegal in France, and such stipulations are sustained even for a period during which the parties have lived in France. In accordance with a decree by the Court of Austria of 12th January, 1787, there is in that country a statutory provision that interest which has been stipulated in accordance with the law of the place where the contract was made must in bankruptcy be ranked by Austrian judges as valid, although the rate may be higher than the custom of Austria permits (Püttlingen, p. 104 ; Unger, p. 186).

<sup>16</sup> See the discussion in § 68, against Savigny's theory (§ 374, Guthrie, p. 252), according to which the *lex fori* must rule in cases where the interest is allowable by it, but illegal according to the law which determines other questions as to the transaction.

<sup>17</sup> Fœlix, i. pp. 251-53 ; Massé, p. 184. Older writers say that the law of the place must rule, "*ubi mora contracta, facta est.*" Bartolus in 1, 1, C. Trin. No. 18 ; Curtius Rochus, de statutis, sect. 9, § 49. Boullenois, ii. p. 252, "*Où la demeure est encourue,*" cf. pp. 478-79. If this principle were correct, questions of warranty as to the sufficiency of goods sold would have to be determined by the law of the place where the goods were manufactured, if the insufficiency arose there, although both parties might be ignorant of what place that was

the damage is represented by the interest allowed by the custom of the place of payment, he is entitled to claim that as his recompense, a circumstance that is of particular importance in regard to drafts and bills in use among merchants. We must assume, in order to entitle any person to claim the rate of interest allowed at the place of payment in a suit raised somewhere else, that the creditor so claiming had need of the money at the place of payment. He is, therefore, entitled to claim that rate of interest, but with that he must be content, since it was at the place of payment that he had a need for the money; any demand in excess of that would be more than the damage the creditor is presumed to have suffered. The judicial decisions cited by Story have all reference to cases of this kind.

#### (6.) PARTIES TO OBLIGATIONS—AGENCY.

#### § 72.

Where several persons have jointly made some stipulation, or contracted some debt, the local law by which the import of the obligation generally is to be determined, will also decide whether each of the parties has a right to exact, or a duty to discharge, the whole obligation.

If the obligation does not rest upon *bona fides*, or if the special character of the contract (*e.g.*, *ex delicto*) does not require the application of the *lex loci actus*, and if there is no room to infer from the intention of parties that the duty undertaken by them is to be read according to the law of the place of performance, then the *lex domicilii* will settle for each debtor whether or not he is bound to satisfy the whole or what part of the debt, or whether he is entitled to refer the creditor to some other debtor (*beneficium divisionis, excussionis*).<sup>1</sup>

Story<sup>2</sup> takes the following illustration: By the law of England a double policy of insurance upon a ship for the same voyage is quite competent; in case the ship is lost, the

<sup>1</sup> These pleas belong to material law, and do not, therefore, depend upon the *lex fori*; Burge, iii. p. 765; Fœlix, i. p. 254; Story, § 322*b*.

<sup>2</sup> § 327*b*.

insured may require the whole sum insured from either of the underwriters he pleases, and then the underwriter who pays has *pro rata* a right of recourse against the other. By the law of France the first policy, which covers the full value of the subject, is the only valid policy, and the first underwriter, if he should have to pay, has no recourse at all against the second.<sup>3</sup> Now, in this case, the insurer who has had according to English law to make good the obligation has no action against a French insurer, and neither has the first insurer, who has by French law become answerable, any recourse against the second insurer in England. There is no recourse against the French insurer, because, in binding himself, he did not mean to make himself liable to any such claim, and the Frenchman has no right of recourse against the other, because French law, which supplements and determines his declaration of will, knows of no such right.<sup>4 5</sup>

It is a very important and very common question whether

<sup>3</sup> Code de Commerce, art. 359.

<sup>4</sup> So too Story, for this reason: "If a different view were adopted, there might be an entire want of reciprocity."

<sup>5</sup> Emérigon, *Traité des. assur.* i. chap. 4, sect. 8, § 2, says as to the local law of contracts of insurance: "Contracts of insurance made abroad between Frenchmen will be determined in France according to French law; for the law of their country follows them everywhere. In the case of such contracts between a Frenchman and foreigners, concluded abroad, the law of the place where the contract was made is applicable. The same is true if a Frenchman in a foreign country carries on a business of insurance on his own account." These rules, however, are not universally applicable. If one carries on an insurance business at a particular place as a profession—the usual case—the *lex loci contractus* will decide all questions without reference to the domicile of any person insured. See Voigt., and Heinichen's *Archiv. für Handelsrecht* (1858) pt. i. p. 210. On the other hand, if two subjects of this country happen to make a contract of insurance abroad, the first rule given by Emérigon is applicable. Indirectly the obligation of the insurer may be affected by the law of the place where the adjustment is made. Cf. Voigt. p. 211. "It is well known that the adjustment between the interests of the ship and of the cargo involved in the contract, after the voyage is completed, when ship and cargo are separated partly or wholly, will be made according to the principles of the law there recognised. By this foreign law there may be a higher or lower rate of contribution laid upon the owner or the freighter than there was by the *lex loci contractus*, and in regard to this the insured must be kept scatheless by the insurer." As to the case of a contract of insurance concluded through an agent, see *infra*, p. 293, text and notes 10 and 11.

a contract, concluded by any one as representative of another, is in a legal sense made at the place where the principal is, or where his agent is. Fœlix, i. p. 244, and several of the decisions given by Story (§ 286*b*) take the latter view, for the reason that the mandatary fully represents the mandant, and therefore the case must be treated as if the mandant had come to the place where the contract is concluded.<sup>6</sup>

Two views of the case may be taken ; first, we may hold the contract to have been made by the agent or mandatary, and to affect the principal or mandant only by virtue of the contract or legal relation that exists between him and his agent.<sup>7</sup> This view will give a result contrary to that expressed above, for, as the agent's contract only takes effect as regards the principal by force of the contract between these persons, and only so far as that contract permits, the obligation of the principal must be determined by the law to which the contract of mandate itself is subject,<sup>8</sup> and that, as a rule, will be the *lex domicilii* of the principal. By the second view, which regards the contract as concluded with the principal himself, and looks upon his mandatary as a messenger, it is still more difficult to reach the result stated above. If we consider the matter as if the intention to contract did not originate with the agent, but with the principal, that intention of course originated where the principal happened to be, and the case we are considering cannot be distinguished from that of a contract concluded by letter or telegram.<sup>9</sup> The theory which regards the contract as if it were concluded by a principal who is personally present on the spot, rests upon a contradiction ; it looks upon the principal as the party to the contract, but makes the law of the agent the test by which the contract is tried.

It is, however, correct to say, that within the limits of the authority given to the agent, his representations, and the law

<sup>6</sup> So too Rocco. p. 380, as quoted by Fœlix.

<sup>7</sup> So Thöl, Handelsrecht, ii. § 25.

<sup>8</sup> Unusual limitations of agency can only be regarded if proper notice is given. Thöl. Handelsr. § 31, c. ; Savigny, Obligationenrecht, ii. pp. 60-1.

<sup>9</sup> See on that point *infra* § 73, and *supra* § 37.

to which these are subject,<sup>10</sup> must rule, but beyond these limits no responsibility attaches to the principal.

In support of the opposite view, it is urged that, if the other party to the contract, in reliance upon the law of the place of contract, has *bona fide* held the powers of the agent to be larger than they were, it is necessary for the sake of protecting commerce to apply the *lex loci contractus*. This is, however, a mistake. If any person contracts with one who describes himself as the agent of the subject of another country, he has a plain intimation that he should inform himself as to the laws of the place where that authority was conferred. If he neglects this, he no more deserves protection than if he had contracted without inquiring whether there was any authority at all ; in both cases he may have recourse to the express or tacit representations of the agent to which he trusted.

When we consider the point more closely, it will be seen that to determine the authority of the agent by the *lex loci contractus* would be quite inconsistent with the security of commerce. Statutory representatives of legal persons and those who represent others by virtue of family relationship as well as ordinary business agents, could, by contracts made abroad, where the law of the land gave them wider powers, bind the persons represented by them in a way entirely unforeseen. What use would there be, for instance, in a joint stock company restricting the powers of its manager by requiring the concurrent authority of a board of management, or of a general meeting of shareholders, when he would not be bound thereby in any contract concluded abroad ? The owner or part owner of a ship who can, according to the law of the place where the shipping company exists, free himself from liability by abandoning the ship, might, by a contract of the master's concluded abroad, be bound to pay something more.<sup>11</sup> But although, in conformity with the

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<sup>10</sup> That is to say, the interpretation of contracts made by the mandatory will depend upon the *lex loci actus*. See the discussion as to the interpretation of contracts, § 81.

<sup>11</sup> See the case given by Story, § 286c. "The question whether a third party, as partner of the debtor in the contract, can be made answerable for the prestations of a contract, is not to be ruled by the law of the place where

general principles which govern the interpretation of contracts, the law that is in force at the place where the authority originates, must be applied to ascertain the extent of the authority conferred, there may indirectly be established an obligation upon the principal to answer to the other party as the *lex loci contractus* may direct ; e.g., a joint stock company appoints some one in a foreign State to be its permanent agent, and advertises the appointment in the public newspapers of that country without noticing the limitations imposed on such an appointment by the law of the domicile of the company. The public are in such a case entitled to hold that the authority of the agent is that which such a person has by the law and the usage of their own country.<sup>12</sup>

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the contract was made, but by the law of the place where the partnership was constituted." Judgment of Supreme Court of Appeal at Lübeck, 31st March, 1846 (Seuffert, ii, p. 324). Public intimation of the responsibility of the partners is only in so far necessary as they are required by the law of the place where the company has its domicile (Fœlix, ii, p. 33).

<sup>12</sup> [Story (286*b*) holds that the law of the place of the contract, and not that of the domicile of the mandant or of the constitution of the mandate, will regulate the measure and extent of the obligation incurred ; this result he considers most equitable, and it seems to be adopted by the decisions of the courts of America ; it has been adopted too in Germany (Harvey *v.* Engelbert, Court of Bremen, 5th March, 1877). The opposite rule, however, prevails in England (see Story as cited). Brodie in his notes on Stair, vol. ii. p. 956, thus sums up the matter : "The clear result then is, that the transactions must be held to have reference to the master's implied mandate" (the commentator is dealing with contracts by a shipmaster), "according to the law of his own country—a mandate which it is the duty of those who deal with him as an agent to ascertain the extent of ; and that, while they never can justly complain of having their right limited by such a principle, the shipmaster cannot be supposed to intend an abuse of his powers ; whence the very gist of all contracts, the understanding of parties, would be wanting to infer a right, *ex lege loci contractus*, which the scope of his authority did not import."

Mr. Maclachlan, in his work on Merchant Shipping, criticises the views advanced by Mr. Story and Mr. Brodie, and adopts as the rule in such contracts the law of the flag which the ship carries, a law which must be known to those with whom the master contracts (p. 180). This conclusion is rested mainly on a decision of the Court of Queen's Bench, Lloyd *v.* Guibert, L. R. 1, Q. B. 115, in which Blackburn, J., says in language which is applicable generally to the law of mandate : "We think that the power of the master to bind his owners personally is but a branch of the general law of agency. And it seems clear that if a principal gives a mandate to an agent containing a condition that all contracts which the agent makes on behalf of his principal shall be



We must distinguish between the liability incurred by the principal by his contract and the constitution of a real right in things that are in the custody of his agent. If the law, which is recognised at the place where the subject is situated, allows real rights to be constituted by contracts made between the agent and third parties, without considering the nature of the agents' authority,<sup>13</sup> then the principal must lose his rights without regard to the law, which determines the character of the agency in other respects. This is the result of the universal validity of the *lex rei sitæ* in the law of things, and is less hazardous for the principal who has actually put his whole property into the hands of an agent, and can incur no obligations beyond the value of the property so committed to his charge.

#### (7.) CONTRACTS CONCLUDED BY LETTER.

##### § 73.

The discussion of contracts concluded by agents leads naturally to the question, by what local law contracts concluded by letter between persons who never meet are to be determined. We have already (p. 266) discussed the question in so far as the form of the contracts is concerned, and the result of the principles we have assumed is that the general rule whereby the laws of the domiciles of the two parties decide, must be applied. No reason at all can be given why either the offerer or the acceptor should be entitled to appeal exclusively to the law

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subject to a defeasance, those who contract through that agent, with notice of that mandate containing such a limit on his authority, cannot hold the principal bound absolutely. And, we think, as far as regards the implied authority of the master of a ship to bind his owners personally, the flag of the ship is notice to all the world that the master's authority is that conferred by the law of that flag,—that his mandate is contained in the law of that country, with which those who deal with him must make themselves acquainted at their peril."

This doctrine (which is in substantial harmony with that of the text) may be applied generally to the law of agency or mandate, where the agent is known to be acting under a mandate given him by a foreigner.]

<sup>13</sup> *E.g.*, by the law of England (5 and 6 Vict. c. 36) an agent provided with certain papers, and actually in possession of goods, may effectually deal with these as if he were the owner, in so far as the party with whom he deals is in good faith (Cf. Stephen ii. pp. 76-7).

of his own domicile. Each party can only hold the other to be bound in the sense in which the law of that other's domicile permits.<sup>1</sup> It is of no importance in which of the two places the contract must be legally held to have been made so as to have the effect of preventing either party from resiling; and as various deliverances have been given by various codes upon this question also, it is of the less moment. Many authors, no doubt, lay stress on this alone.<sup>2</sup>

Wächter<sup>3</sup> and Savigny<sup>4</sup> are of the view we have taken. The latter no doubt makes this distinction, that where there is a definite place of performance fixed the law of that place is alone to be applied. It is not necessary again to discuss this point, resulting as it does from the principles adopted by Savigny.<sup>5</sup>

The case of the domicile of the writer and the place from which he dates his letter being different, is generally passed over; but it must be an event of common occurrence, as, for instance, when one for some time is engaged in carrying on trade in a foreign country. It may easily be solved upon the general principles we have assumed. Under the same conditions under which the law of the place where a contract is made is applicable to a verbal contract, is the law of the place where the letter is dated to be preferred to the law of the domicile of the writer.<sup>6</sup> We shall find an important application of this rule in the law of bills (cf. § 85, 1).

<sup>1</sup> We must premise that the domicile, and the place from which the letter is dated, coincide.

<sup>2</sup> The deliverance of Casaregis, disc. 179, No. 10; of Burge, iii. p. 743; of Story, § 285; of Bornemann, i. p. 65, and of Fœlix, i. p. 244, is for the domicile of the acceptor; a judgment of the Supreme Court of Appeal at Dresden (reported by Kritz, ii. p. 120); Massé, p. 130 (No. 94); Günther, p. 750; Seuffert, i. p. 252, on the other hand pronounce for the domicile of the offerer. See, too, a judgment of the Appeal Court of the Rhine at Berlin, 21st September, 1831 (Volkmar, p. 141).

<sup>3</sup> ii. p. 45.

<sup>4</sup> § 371; Guthrie, p. 216.

<sup>5</sup> See above, § 66, note 5; Göschel., Civilrecht, i. § 31, p. 114. The Prussian A. L. R. § 112, makes the law of the domicile of that party, according to which the transaction can best be carried out, rule the form. We have already shown how mistaken an application of the well known rule of Roman law this is.

<sup>6</sup> Particularly if *bona fides* requires it. See above, p. 268.

If a mandatary, in consequence of a mandate contained in a letter, makes a contract at his own domicile and in his own name, the mandant is liable under the conditions and to the extent prescribed by the law of the agent's domicile ; not, indeed, because that is the place where the contract was made, but because the agent has without doubt bound himself by that law, and is to be kept scatheless at the hands of his principal even according to the law of his own domicile.<sup>7</sup> If the agent should buy for himself the goods entrusted to him, the law of his domicile will rule this sale ; for he would have to give any other purchaser that privilege, and he has himself contracted under the same conditions as any other purchaser.<sup>8</sup> If the mandatary does not make the contract in his own name, the principles we have already laid down as to the contraction of obligations by an agent will apply.<sup>9</sup>

If any person, in consequence of a contract concluded by letter, makes advances to another ; if, for instance, an agent who has not received any remittances from his principal buys goods for him, then, although the obligations of both parties are to be determined by the laws of their domiciles, such a person may calculate upon receiving the interest current at the place where the advance was made. This is the result both of the principles of mandate, and of those applicable to the interest upon a loan ; of the former, because the agent must be kept scatheless, and that cannot be unless he receives the interest usual at his domicile ; of the latter, because the

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<sup>7</sup> Cf. *supra*, p. 128. Massé, p. 134-6 (Nos. 137-96), Casaregis ; Story, § 285, and the decisions there cited, all confirm this. The grounds assigned are, however, different. Story derives it from the principle that the mandate must be held to have been completed at the domicile of the agent. Massé concurs with this on grounds of expediency—an opinion which is no doubt at variance with the rest of his theory (“ *Le contrat du commissionnaire perdrait toute son utilité si le commissionnaire ne pouvait agir qu’après avoir répondu par lettres qu’il accepte.*”)

<sup>8</sup> Massé, p. 136-7, “ *Le mandat absorbe la vente.*”

<sup>9</sup> A judgment of the Supreme Court of Berlin laid down this doctrine : “ With reference to a commission for the purchase of corn for spring delivery given to an agent in Berlin, the usage of trade in Berlin, by which delivery must be made up to a particular day, will be applicable, if this usage was known to the party giving the order.”

rate of interest on a debt is to be ruled by the law of the place where the capital is spent.

### (8.) RATIFICATION.

#### § 74.

A kindred question is the question whether the place where a contract is ratified, or the place where it is originally drawn up, is to be held as its true place.

Casaregis<sup>1</sup> decides that it must be the place where it was originally made. He says : "*Ratio est, quia ille ratificationis consensus, licet emittatur in loco ratificantis, et ibi videtur se unire cum altero præcedente gerentis consensu, qui venit a loco gerentis ad locum ratificantis, retrotrahitur ad tempus et ad locum, in quo fuit per gestorem initus contractus.*" But the question is not to be so absolutely decided. When any one becomes a party to a contract already validly concluded between others, it may very well be that he can only ratify that contract to the effect and in the terms in which it is already conceived ; and it was that case which Casaregis had in his view. If, on the other hand, the contract was from the first concluded on condition of obtaining the approval of that third party, this case is to be considered as identical with the case where one sends an offer to another ; the representative of the third party has only thrown the contract into the sort of shape which is likely to meet the approval of his principal.<sup>2</sup> The place where the contract was drawn up is alone of importance for the interpretation of the contract in its true sense.<sup>3</sup>

On the other hand, where a contract already concluded is ratified by the same persons, the question whether the law of the place where it was first drawn up, or of the place where the forms required by statute or stipulated by

<sup>1</sup> Disc. 179, § 20, according to the citation in Story, § 286.

<sup>2</sup> For instance, a guardian contracts on behalf of a ward on condition that he shall obtain the approval of the court which superintends the curatory.

<sup>3</sup> Cf. Massé, p. 137. Fœlix (i. 245) at first proposes that the place where the contract is originally drawn up shall rule, because the agent represents his principal, but subsequently (i. 246) decides the case given in the preceding note in the opposite way.

express agreement of parties, are gone through, is to rule, depends, as Hert<sup>4</sup> properly remarks, in the first place upon whether the form serves merely for authentication or is required to give validity to the deed. In the former case, the place where the contract is put into the required shape cannot be held to be the place of the contract or decisive as to it; in the second case, it is truly the *locus contractus*,<sup>5</sup> but the previous agreement of parties is not without importance, in so far as antecedent negotiations may be used to interpret a contract.

(9.) ALTERATION OF EXISTING OBLIGATIONS—*Dolus, Culpa, Mora*—DESTRUCTION OF THE SUBJECT OF THE OBLIGATION.

§ 75.

The alteration of existing obligations by contract needs no further elaboration. If a new contract is added on to an existing contract, the place of the latter contract is not identical with the place of the former. The second contract concluded, we shall say, at B is formally valid, if it is in conformity with the law recognised at B, although a different form is necessary at A, the place where the first and principal contract was made.<sup>1</sup>

On the other hand, the alteration of obligations through the fault of the debtor is to be ruled by the law which is generally applicable to the interpretation of the contract. If the debtor produces an alteration of the obligation through *culpa* or *dolus*, that is merely an indirect result of the fact that by the obligations of the contract he was bound to act

<sup>4</sup> II., 55. Cf. Burge, iii. p. 775.

<sup>5</sup> Holzschuher, i. p. 74; Hauss, p. 41; Massé, ii. p. 138; Foelix, i. § 113, p. 258. Judgment of the Supreme Court of Appeal at Jena of 26th October, 1826. Seuffert, i. p. 157; Mittermaier, i. § 31, *ad fin.*

<sup>1</sup> For instance, in one country contracts must be in writing; the parties to such a contract add thereto a *pactum displicentie* in some State in which a contract of the kind may be informally entered into. It must, however, be kept in view that it may be doubtful, looking to the reference to the former contract made in a different country, whether the parties really intended to enter upon a binding engagement, since a particular form was required at the first place, and they did no more than make an informal agreement at the second.

differently.<sup>2</sup> Nothing, therefore depends upon the place in which he has, by reason of this act of *culpa* or *dolus*, incurred liability; the law of this place is only so far of importance as the amount of compensation due to the creditor is to be determined by it.<sup>3</sup> We have already examined (*supra*, § 69, note 2) the opposite theory (Fœlix, i. § 109, p. 254), which takes as its fundamental rule the law of the place where the illegal omission or act has been done. The same principles will determine alterations caused by delay, *mora*, whether it be on the part of the debtor or the creditor. The liability of the debtor arising from *mora*, is identical with his obligation to timeous performance, and the loss suffered by the creditor in consequence of the failure to accept performance is the immediate consequence of the limitation of the debtor's liability contained in the original contract of obligation to which he was a party.<sup>4</sup> The disadvantageous results of denying liability in an action, are to be considered as purely penalties imposed upon the debtor<sup>5</sup> in the course of process, and depend, therefore, upon the law of the place where the suit is proceeding.

After what we have already said it cannot be doubted that any alteration of the obligation by accident, *e.g.*, by the destruction of the object of the contract,<sup>6</sup> or by a *commodum* attaching to it (fruits) is to be ruled exclusively by the local law to which the contract is generally subject.<sup>7</sup>

<sup>2</sup> Cocceji, de feud., vi. § 7; Hert, iv. 55; Seuffert, Comm. p. 254; Muhlenbruch, § 74; Story, § 307.

<sup>3</sup> *E.g.*, If a person uses an article committed to his charge in an illegal way, he must restore the current price of that article at the place where he has so used it. Cf., Story, § 307, who notes that if a vessel has been used in violation of a contract, the amount of damages must be determined by the rate of interest current in that place.

<sup>4</sup> Cf. authors cited in note 2. As to interest upon postponed payments see *supra*, § 71. Fœlix is of a different opinion. Bartolus ad L. 1 C. de S. Trin., No. 18, holds that the law of the place "*ubi contracta est mora*" must decide.

<sup>5</sup> *E.g.*, by Roman law in consequence of the provisions of 18th Nov., c. 8, the application of which at the present time is not, however, certain.

<sup>6</sup> Cf. Arndt's Pandects, § 253.

<sup>7</sup> Savigny, § 374; Guthrie, p. 256-57.

## (10). TRANSFERENCE OF OBLIGATIONS—ASSIGNATION.

## § 76.

The transference of an obligation to some other person as creditor is subject to the local law to which the contract is generally subject: the question whether an obligation has been validly transferred, is identical with the question whether an obligation still subsists for the advantage of the former creditor, or whether another person can claim the advantages of it for himself.<sup>1</sup> The *lex domicilii* of the debtor will therefore, as a rule, determine the question.

But the assignation or transference of a right to compel implement rests also upon an independent transaction between the former creditor and his assignee, it may be upon a sale between them. The essentials of this independent transaction and its operation depend upon a different local law from that which rules the obligation which is transferred. If the transference or assignation of the obligation, considered as an independent transaction between the original creditor and his assignee, is valid, the debtor plainly has no interest to refuse payment to the assignee. If he obeys the will of the original creditor, validly declared, that he shall pay to the assignee, he is protected in any question with the original creditor by the *exceptio doli*, and he has no further interest in the matter. The case stands thus:—the debtor is free if he pays to a creditor who has right as assignee by the law that rules the obligation which has been assigned, but he is also free if he pays to a creditor who has right by the local law that regulates the independent transaction. An exception to the former rule occurs only if the debtor knows for certain that the creditor has not yet truly assigned his rights to the pretended assignee according to the law that regulates the assignation; the debtor who should in such a case plead payment would be met successfully by the *replica doli*. For it must be held to be in accordance with all systems of

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<sup>1</sup> Assignation of a right of action is by Roman law in its form merely a mandate to sue, but in its results it is the same as a real transference of the right (Arndt's Pandects, § 254, note 4).

positive law, that no debtor is entitled to pay to one whom he knows not to have right to the debt as against the original creditor.<sup>2</sup>

This is the only theory which can be actually put in force without hardship. If the local law to which the original contract was subject were alone to decide, the right of the creditor on the one hand would be endangered, and on the other could, in many cases, not be transferred without great difficulties: the former, because a declaration of will, which by the *lex loci actus* would have no binding force, would, by the law of the place of the original obligation, transfer to the assignee the obligation itself, or a right to claim upon it; the latter, because it would frequently be difficult, or perhaps even impossible, in a foreign country to observe the requirements of an assignation according to the local law applicable to the obligation so assigned. If, on the other hand, the law to which the assignation as an independent act is subject, were to rule, we should require the debtor to know all kinds of foreign territorial law, that he might at his own risk determine what the right of any pretended assignee was,—a requirement all the more unfavourable since the debtor has no power either to foresee or to prevent the assignation.

On these principles we can easily determine what is the effect of an arrestment of a right to enforce implement or payment which is said to have been already assigned. Payment made by the debtor in *bona fide* in accordance with the law that regulates the principal obligation in question must

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<sup>2</sup> Judgment of the Supreme Court of Appeal at Lübeck, 29th November, 1855 (Frankfurt, Coll. of Römer, 2, p. 263) and 31st March, 1856 (p. 359). "Questions as to the essentials of the assignation are ruled by the law of the place of the assignation." In both cases it may be observed that the foreign law was favourable to the right claimed by the pursuer. On the latter judgment cf. Seuffert, vol. ii. p. 162. Judgment of the Supreme Court of Appeal at Lübeck of 14th September, 1850 (Seuffert, vol. x. p. 122, reported from the collection referred to, vol. ii., p. 100): "The form of the assignation is fixed by the law of the place in which it was carried through." In this case, too, the law of the place of assignation was favourable to the transference of the right. That the form should be determined by the law of the place where the assignation was carried through, is a consequence of the rule *locus regit actum*."



be recognised by all creditors ; the debtor could not be forced to make payment a second time, even although the assignation were not yet validly completed according to the local law which regulates it. But if payment has not yet been made, the debtor cannot appeal to the territorial law that regulates the principal obligation, with a view of disputing the validity of the arrestment : for by laying on this arrestment it is asserted that an assignation, if such there be, is invalid by the local law that regulates it : until this question between the arrester and the pretended assignee is determined no *bona fide* payment can be made.

It. has been said that the *lex domicilii* of the creditor alone can determine the validity of assignation or transference of a right to demand implement,<sup>3</sup> because that right is merely a *jus incorporale*, and, therefore, as in the case of moveables, the rule, "*Mobilia sequuntur personam (sc. domini sive creditoris*"<sup>4</sup>) applies. We have already seen that this rule cannot be maintained to any such effect ;<sup>5</sup> the fact of the universal validity of the domicile of the creditor cannot, therefore, be established by it. But it is true that the result of that theory, as a rule, coincides with the result of our own, for assignations are generally made at the domicile of the creditor.<sup>6</sup> This is indirectly recognised by Story himself, who determines the validity of the indorsation of a bill by the law of the place where it is made.<sup>7</sup>

The law to which the obligation is generally subject must determine whether the assignee can raise an action in his own name against the debtor, or must do so as assignee *alieno nomine*. If this law recognises assignations in the strict sense only, so that the new creditor is only recognised as the *procurator in rem suam* of the original creditor, it is not

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<sup>3</sup> So Story, § 395 *et seq.*, and the judgments of English and American Courts there cited.

<sup>4</sup> See particularly the citation from Livermore's "Dissertations" in Story, p. 537, note 2.

<sup>5</sup> See *supra*, §§ 59, 60.

<sup>6</sup> The judgments given by Story in detail at the passage cited, in which domicile and place of assignation are the same, serve to confirm the view taken in the text.

<sup>7</sup> Story, § 316a.

possible that the debtor should by an assignation in a foreign country be placed in any less favourable position, although the difference may be only formal. But if that law allows a complete transference of the obligation, this further question must be decided, viz., whether such a transference was really entered into according to the law which is applicable to the assignation.<sup>8</sup> Both local laws must, therefore, concur in giving the new creditor right to sue in his own name, before he can do so. On the other hand, the law of the country where the court is, is in this view unimportant. Although the creditor is as likely to come by his own whether he sues *alieno nomine* or *suo nomine*, the question as to which is correct depends upon the provisions of material and not formal law.<sup>9</sup>

We must determine in the same way the competency of a transference or assignation of the rights conferred by an obligation. If certain rights, or rights under certain circumstances, e.g., rights involved in a depending action (*res litigiosæ*, cf. L. 3, D. de litigiosis, 44, 6),<sup>10</sup> cannot, according to the local law to which they are subject,<sup>11</sup> be made the subject of assignation, the debtor need not pay any heed, of course, to an assignation carried out in a foreign country.<sup>12</sup> If assignation is permitted by this law, but forbidden by the law of the place where it was carried out, then the assignee cannot appeal to the *lex loci actus* in respect of the form of the assignation.<sup>13</sup>

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<sup>8</sup> The intention of the creditor really determines this question.

<sup>9</sup> For different views see Story, § 565 *et seq.* There are not, however, wanting decisions which proceed from the point of view here assumed, and these are approved by Story.

<sup>10</sup> The Prussian A. L. R. I., ii. §§ 383-4, expressly repeals the prohibition on the assignation of *res litigiosæ*. Cf. the provisions of the Code Civil, art. 1699.

<sup>11</sup> This is, as a rule, the *lex domicilii* of the debtor.

<sup>12</sup> Cf. *infra*, § 85, as to indorsations, and the subject of negotiable notes, § 83; Story, §§ 353, 353a.

<sup>13</sup> Cf. *supra*, p. 250. The judgment of the Supreme Court of Appeal at Lübeck on 31st March, 1856, from the Frankfort Römer Coll. vol. iii. p. 325, reported by Seuffert, vol. ii. p. 161, seems to contradict this. It pronounces that the validity of assignations of *res litigiosæ* is to be valid, not by the law of the place of the contract, but by that of the place where the process depends. The place of the process and the domicile of the defender were, however, the same. See, too, the judgment of the Supreme Court of Appeal at Munich, 7th January,

In the same way we can dispose of cases under the *Lex Anastasiana*.<sup>14</sup> This law simply provides that the assignation is invalid, and the debtor is free as regards any sum in excess of the price paid for the assignation.<sup>15</sup> Therefore, the local law to which the obligation itself is subject must rule in such a case : if this law declares that the rights under an obligation may be made objects of exchange without any such restriction as that the price given must be equal to the sum contained in the obligation, no question as to the law of the place where the assignation took place arises, because this law, in subjecting free trade in obligations to restrictions, cannot reasonably be held to apply to rights which in their origin could be pointed out as open to an unrestricted exchange. The opposite theory, by which it is maintained that the local law of the assignation itself should apply, would make the rights of the creditor entirely dependent on the circumstance that the assignation took place at this or at that place—a circumstance of no importance for the security of the debtor,<sup>16</sup> and one that could, besides, easily be planned by a creditor. As a general rule, then, the *lex domicilii* of the debtor will regulate this question,<sup>17</sup> but not universally. We might, no doubt, for the reason that the *Lex Anastasiana* is in the interest of the debtor, hold the *judex domicilii* bound to apply it in every case to any obligation undertaken

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1845 (Seuffert, i. p. 444) : "The act of third persons, the cedent and the assignee, cannot alter the rights and duties of the debtor, which were originally dependent on Prussian law. Roman law, under the dominion whereof the pursuer—who is assignee—lives, no doubt gives the debtor the *exceptio Legis Anastasianeæ*. But this has been expressly rejected by the law of Prussia. Seuffert is right in holding (Comm. i. p. 256) that the position of the debtor cannot be altered by the fact that the assignation took place under other laws."

<sup>14</sup> The *Lex Anastasiana* is abolished in Prussia by the A. L. R. i. 11, §§ 390-91.

<sup>15</sup> Cf. the provision of the Code Civil, art. 1699.

<sup>16</sup> The *Lex Anastasiana* exists in the interest of the debtor, cf. L. 22, 23, C. Mandati, iv. 35.

<sup>17</sup> To this effect a judgment of the Supreme Court of Berlin of 16th November, 1858 (Striethorst, xxx. p. 353), which refused a *debitor cessus* domiciled in Prussia the right to maintain a plea founded on the *Lex Anastasiana*, although the assignation was executed in a foreign country where this law was recognised, and the cedent was also domiciled there.

by one of his countrymen.<sup>18</sup> But this would be wrong, for all provisions for the protection of the debtor are not to be applied to obligations he may undertake in a foreign country, or that are to be performed there by him, and the *bona fides* of commerce plainly requires that the creditor should not be hampered in his exercise of a right so highly important as that of assignation, if he has trusted the debtor in reliance upon this right.

Savigny<sup>19</sup> maintains, in reference to the *Lex Anastasiana*, that the law of the place of action should rule, and that this statute rests upon the consideration that a traffic in the rights under an obligation sold for a sum under their nominal worth, might be oppressive and dangerous to the debtor, and must therefore be scouted as immoral and mischievous to the public. One may concede these premises without being led to Savigny's conclusion. For, although the law may regard as immoral a traffic in obligations which in their origin are subject to its dominion, it does not follow that the same will be the case with obligations which in their origin are subject to the law of a foreign territory, which gives the creditor an unrestricted right of sale.<sup>20</sup> The contrary, indeed, must be affirmed, especially since some particular kinds of inland obligations, such as obligations on bills, are free from the limitations of the *Lex Anastasiana*, as being in their origin subjects of free trade. It needs no further exposition to show what uncertainty for the debtor might arise if the local law of a place of action, which could not be determined beforehand, were to be applied.

<sup>18</sup> Cf. a judgment of the Supreme Court of Appeal at Lübeck, in 1831, in the case *Halle v. Tonnies*, Thöl, *Entscheidungsgründe*, p. 139. "The *Lex Anastasiana* passed for the security of the debtor, must be applied according to the law of the debtor's domicile."

<sup>19</sup> § 374 ; Guthrie, p. 253.

<sup>20</sup> To this effect the judgment of the Supreme Court of Appeal at Munich in 1845 (Seuffert, i. No. 422), cited by Savigny himself. (Guthrie, p. 253, note 3.)

(11.) PERFORMANCE AND DISCHARGE OF OBLIGATION —  
 ACKNOWLEDGMENT—PLEA *non numeratæ pecuniæ*—  
*Beneficium competentiæ*—FORCED CURRENCY.

§ 77.

The performance and the discharge of obligations must be ruled by the law that regulates these obligations generally.

The way in which performance is to be made is specified by the terms of the obligation, and the question whether an obligation is discharged is coincident with the question whether it still exists.

In the first place, just as with alterations upon existing obligations, so their performance and discharge can only be effected by a special legal transaction, and the law under which this transaction falls must be allowed to have the same influence upon the performance and discharge as we have shown it has upon the alteration of existing obligations.

There are, however, in the second place, certain ways of discharging obligations, and occasional means of delaying performance, which, as a rule, take place in accordance with the *lex domicilii* of the debtor, without regard to the local law which, for other purposes, regulates the obligations; such are the modification which the creditor's right undergoes in the case of the debtor's bankruptcy and the operation of prescription.

The performance of an obligation, if it consists of an act which cannot be held to be an independent legal transaction, must be determined exclusively by the law that regulates the obligation in other respects.<sup>1</sup> If, on the other hand, it rests upon a special transaction between the debtor and the creditor, this special legal transaction for discharge of the obligation must be ruled by the law to which that transaction itself is subject, unless we have to infer a reference by the parties themselves to the local law of the obligation originally made. For instance, let us suppose that by the local law of the original obligation payment by bills or drafts is only a con-

<sup>1</sup> Burge, iii. p. 874. Massé, pp. 175-6, proposes that the law of the place of payment should rule generally in reference to equivalents for payment—*e.g.*, as to the effect of consignment of the sum due.

ditional discharge, and depends upon these bills and drafts being duly honoured ; but, by the law of the place of payment, this condition disappears. If the parties are the same who made the contract at first, then we must infer a tacit reference to the local law to which the obligation was subject from the first. But if the parties, one of whom is tendering payment to the other, are domiciled at the place of payment, the local law recognised at that place must be applied, and the payment must be taken to be unconditional ; all reference to the local law to which the obligation was originally subject is in such a case excluded.<sup>2, 3</sup>

The competency of an *exceptio* or *querela non numeratæ pecuniæ*, as against an acknowledgment produced, is to be determined by the same rules. The matter is not subject to any doubt if it is permissible to insert in the document itself, in any form, a renunciation of the plea or *querela*. But, even although the opposite view were correct, that would not show that the plea was applicable in those cases where it must necessarily be assumed that either the transaction to which the payment and acknowledgment have reference, or the transaction of payment and acknowledgment itself, fell under a local law distinct from that recognised at the place of action ; for it is undoubtedly a general rule that the application of many provisions of law, which cannot be excluded by formal renunciation, may be excluded by the consideration that the *bona fides* of trade requires the application of some other different local law.<sup>4</sup>

It might also be said that this plea of no consideration was merely a peculiar rule of evidence, and that rules of evidence must be settled according to the *lex fori*.<sup>5</sup> Without disputing this, we may say in answer that, since in such cases the plea rests upon the assumption that an acknowledgment is as a rule given before performance of the contract, this

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<sup>2</sup> So it is, too, with the operation of novation, delegation, compromise, and *pactum de non petendo*, or any other contract that is simply intended to serve as a discharge. Cf. Burge, cited above.

<sup>3</sup> Cf. Story, § 351a. Arndts. Pandekts. § 281, note 8.

<sup>4</sup> See *supra*, § 66, note 21.

<sup>5</sup> On this see the law of process. Cf. Savigny, § 374 ; Guthrie, p. 248 ; Holzschuher, i. p. 75 ; Fœlix, i. p. 254 ; Massé, pp. 172-73.

assumption is inadmissible if the local law of the obligation, or the law of the place of payment and discharge, as the case may be, is such that the parties had or must have had in view the immediate operation of the discharge.<sup>6</sup>

It is the same with what is termed the *beneficium competentie*—i.e., the right of the debtor to have his liability limited in certain cases to an amount not exceeding what his means permit him to pay, after deduction of what is necessary for his own maintenance. This right only belongs to the debtor as against particular specified claims, and it rests, therefore, upon the material law of the obligation in question.<sup>7</sup> As to the *beneficium competentie* or *moratorium* that arises in bankruptcy, see *infra* § 78, note 7.

The competency of the plea of compensation must be determined by the court in accordance with its own law, in so far as it may fall to be repelled upon formal grounds of procedure.<sup>8</sup> But, on the other hand, a stipulation that this plea shall not be taken against him must be undoubtedly held to be a right of the creditor, springing from his contract, and connected with definite claims under it.<sup>9</sup> This material right will not be lost to the creditor, by the fact that the process happens to depend in a place different from that to whose laws the contract is in other respects subject.<sup>10</sup>

The question, whether a creditor must accept a statutory forced currency of depreciated foreign paper, is answered in the negative by Massé;<sup>11</sup> at least the creditor, he thinks, can only be required to accept such a paper currency at its real value. Although the creditor has no means of forcing his

<sup>6</sup> Cf. Fœlix, i. p. 448.

<sup>7</sup> Savigny, § 374; Guthrie, p. 248; Unger, i. p. 186.

<sup>8</sup> The rule, for instance, that both claims must be liquid is a rule of procedure. Cf. Code Civil, 1291; Abs. 1.

<sup>9</sup> *E.g.*, by Roman law (L. 14, § 2; C. de compens. iv. 31) compensation cannot be pleaded against a claim upon *depositum*. (Cf. too the rule of Prussian law, A. L. R. i. 16, §§ 366, 367, whereby no compensation can be pleaded against alimentary obligations). Whether a particular claim can be pleaded in compensation depends upon the local law of this counter claim; it determines the extent of the operation of the counter claim.

<sup>10</sup> Story, § 575, proposes the *lex fori* as the general rule. Cf. Burge, iii. p. 874.

<sup>11</sup> p. 170.

debtor to make any further payment in the country whose law ordains that payment may be made in this paper currency, he may in such a case sue his debtor in the courts of any other country where that debtor possesses property, and obtain and put in execution a decree for the full amount of the debt. To this view I cannot, however, assent. The creditor might, with as much justice, dispute the binding force of any other law that in whole or in part destroyed his right of action under the contract—*e.g.*, the law of prescription, if it did not exist in the legal system to which he was personally subject. If the obligation in dispute is generally subject to the law of the country in which there is such a forced currency, the discharge of the obligation must be ruled by the law applicable to this currency. But the fact that payment happens accidentally to be made somewhere in that country is not decisive of the point.<sup>12</sup>

This view is undoubtedly justified by practice. A forced currency is only ordained by the government of a country in the extremity of necessity, for the institution of such a depreciated currency must have the worst effect in the future upon the credit of the State and of its subjects. To apply the former view would only ensure a very small measure of assistance, because it is purely accidental whether the debtor has property abroad or not, and since he could not in future venture to send any articles of property, or even money, to creditors, for fear of an attachment being laid upon it, the result would be that commerce would be completely crippled, and the public would suffer. The case would no doubt stand differently if it was proposed to apply this forced currency according to its nominal value to all claims which in truth belonged to a foreign country, but which accidentally came to be paid or to be sued upon in the country where this currency was in force ; no such presumption, however, can be made unless it be expressly so enacted.<sup>13</sup> [*Infra*, p. 345, note 14.]

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<sup>12</sup> Two countrymen make a contract at their domicile, and for convenience agree that payment shall be made in some country where a forced currency is subsequently introduced. In this case, the creditor must accept the paper, for the enactment extends to all payments made within the territory of the State, but only at its real value.

<sup>13</sup> Cf. Massé as quoted above. "*Il arrive souvent que les lois d'un pays,*



A discharge of contract obligations directed exclusively against foreigners, or confiscation in defiance of international law, is not binding upon foreign states and their subjects.<sup>14</sup>

The discharge of an obligation in consequence of a legal judgment is to be determined upon principles which we shall discuss in the law of process.<sup>15</sup>

## (12.) EXTINCTION AND MODIFICATION OF OBLIGATIONS IN CASE OF BANKRUPTCY.

### § 78.

The influence which declared insolvency or the failure of a debtor has upon his obligations may be of two kinds ; it may in the first place affect the execution of the obligation, or in the second, the obligation itself. The former effect of bankruptcy belongs to the subject of the recognition and execution of foreign judgments : with the second we shall deal here ; it consists in the delay of performance which some systems of law require to be imposed under certain conditions, and in the absolute or partial discharge of obligations which, especially in mercantile bankruptcy, may be brought about either by statute or by the will of a majority of the creditors.<sup>1</sup>

The view which Story and most of the judgments of English<sup>2</sup> and American courts adopt, holds that an obliga-

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*dont la valeur monétaire est dépréciée, établissent dans l'intérêt du commerce des règles particulières pour les paiements à faire aux étrangers."* According to the reasoning in the text it is obvious that such a provision as that of the Code Civil, art. 1895—viz., "*L'obligation qui résulte d'un prêt en argent n'est toujours que de la somme numérique énoncée au contract. Si l y a en augmentation ou diminution d'espèces avant l'époque du paiement le débiteur doit rendre le somme numérique prêtée, et ne doit rendre que cette somme dans les espèces ayant cours au moment du paiement,*" is to be applied to foreign creditors also, if the obligation falls under French law.

<sup>14</sup> Cf. Story, §§ 334, 337, 349.

<sup>15</sup> See below, § 125.

<sup>1</sup> According to the bankruptcy law of England, and of some of the United States, a trader in the case of innocent failure, is, upon ceding his property to creditors, freed from his trading obligations (Cf. Story, § 338). By common Roman law it is well known that bankruptcy has not the result of freeing the debtor (L. 1, C. vii. 71).

<sup>2</sup> Cf. Burge, iii. pp. 925-26.

tion cannot be thus extinguished in a foreign state, unless that is the result according to the law of the place where the contract was made or is to be performed; because this mode of discharging an obligation results from the presumed intention of parties, and must therefore be treated as part of the legal bearing of the contract. But the result of this view would be, that a new statute, dealing with the extinction of obligations on bankruptcy, would have no effect upon contracts made before it was passed; for as a rule *jura quæsitæ* resulting from a contract are not affected by any new enactment. But apart from this consideration, the point of view from which this extinction of obligations is looked upon as a matter of contract is totally inadmissible, because it assumes that one party, although he undertakes to fulfil all his obligations, intends to except the case of his insolvency. To assume this, without a special bargain to that effect, is contradictory of the generally recognised rules as to the interpretation of contracts, whereby we are entitled to assume that every man who engages to perform what is generally within his power, means to fulfil his undertaking to the other party.

It is just as impossible to peril the decision of the question upon the circumstance whether the creditor is a subject of the State whose law pronounces obligations to be thus extinguished.<sup>3</sup> This would plainly set native creditors at a disadvantage with foreign creditors. But in any case, as we have seen, the domicile of the creditor is not the general rule in contract obligations. Fœlix (ii. § 368, p. 109) denies all validity in France to a discharge of obligations of this kind in a foreign country, because it rests upon the decree of a foreign judge, and such a decree cannot be put in execution in France; he will only allow an exception in the case of some tacit assent on the part of the creditors to the proposed modification of the obligation.

The following, however, seems to be the correct solution. The object of the law in pronouncing that, by the bankruptcy of the debtor, contracts which have not been satisfied, or not completely satisfied, shall be discharged, or, in sanctioning

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<sup>3</sup> See, on the other hand, Story, § 340.

an arrangement for abandonment or delay which may be carried through by a majority of the creditors, is to insure, in the first place, that the debtor shall be safe from fresh diligence at the instance of his creditors. But it can only attain this object if each and every contract of the debtor, irrespective of its place of origin or fulfilment, is subject to the provisions for that end. How would it be possible to divide the estate of the debtor fairly if foreign creditors, or all those who had contracted with the debtor in another country, should take all the advantages of a speedy settlement of the bankruptcy along with the creditors in this country, and then forthwith begin to use diligence anew against the debtor? The judge of the country in which the bankruptcy which sets the debtor free takes place must undoubtedly be bound to apply his own law to all debts contracted in or out of the country, and with foreign or native creditors.

Similarly, the judges of other countries are bound to recognise that law. In the first place, creditors who have appeared in the bankruptcy procedure must recognise it, because they have subjected themselves to it. They desired to share in the advantages of that procedure,<sup>4</sup> and they must therefore put up with its disadvantages. But whether creditors have or have not lodged claims in the bankruptcy proceedings, it is enough to decide the question that the judge must apply to all creditors alike any rule of his own law which provides that the rights of creditors shall be so discharged, and must therefore give any foreign judge the same power.

This theory,<sup>5</sup> too, meets the practical necessities of commerce. The creditor has no right, by virtue of his contract, to payment in full in a case of bankruptcy; nor has the debtor any right to a partial liberation from his obligations. The creditor can hardly have in view the bankruptcy law of any particular country at the moment when the debt is

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<sup>4</sup> Cf. Fœlix, *ad loc. cit.*

<sup>5</sup> See on this point *Edwards v. Ronald*, i. Knapp's Privy Council Reports, Burge, iii. pp. 928, 929; and the judgment of the Court of Appeal for Rhenish Hesse of 2nd November, 1830. (*Archiv. Merkwürdiger Rechtstfälle und Entscheidungen der Rhein Hessischen Gerichte*, 3, p. 40.)

contracted, for it is uncertain whether the debtor will have property in this or in that country at the time of his possible bankruptcy.

There is, therefore, no disappointment of any just expectation on the part of the creditor, and the interests of the creditors themselves will be best consulted by this theory. The opposite theory, unless native creditors are to be put at a distinct disadvantage, must end in excluding foreign creditors altogether, a conclusion rejected by the laws of almost every State, and by the general principles of the equality of foreigners and natives in the eye of the law. Lastly, it will prevent the debtor from acquiring property in other countries. Wherever he goes he will be followed by the fear of an action upon an old debt at the instance of a foreign creditor; and this uncertainty, although it may be of advantage to some of the earlier creditors, will be all the more mischievous to subsequent creditors of the common debtor.<sup>6</sup>

It is assumed by the laws that regulate the discharge<sup>7</sup> of obligations in bankruptcy that, if a real bankruptcy or a real commercial failure (between which there is an important distinction by the law of England) has taken place in the territory of the State, or if the case is one of a limited bankruptcy, that the obligation in question is included in that bankruptcy. If, on the other hand, there has been no real bankruptcy, but a mere execution of some decree against a debtor in a country where bankruptcy really operates a discharge of contract obligations, that debtor cannot appeal in another country to the system of law which gives the privilege in dispute in the case of a true bankruptcy.<sup>8</sup>

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<sup>6</sup> The argument of Lord Kenyon does not agree with this; see Story, § 342: "It is impossible to say that a contract made in one country is to be governed by the laws of another. It might as well be contended that if the State of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would have been bound by it" (Smith v. Buchanan, 1 East. 6, 11). The examples adduced would lead to the imposition of disabilities upon foreigners at variance with international law.

<sup>7</sup> What is true of the discharge of obligations must also be held to be true in regard to delay granted as a result of bankruptcy, and the benefit of a competency benevolently allowed to the bankrupt as such.

<sup>8</sup> Perhaps it is a case of this kind that is at the bottom of many of the decisions reported by Story, especially as most contracts are entered into at

Another difficulty arises from the fact that a real process of bankruptcy may arise at different places at the same time against an insolvent debtor. What will happen if different laws are to be recognised as applicable to the discharge of obligations, and accordingly to the right to claim for the future upon the contract against the common debtor? As far as those claims are concerned which belong to a definite but partial bankruptcy and sequestration—*e.g.*, when one has a trading establishment at one place and a domicile at another—then, as concerns the claims against the trading establishment, the law of the place where the partial bankruptcy took place will, upon the principles already laid down, decide in the first place. If by that law they cannot be pleaded a second time, they are extinguished; but if they can, then there is still a recourse to the law of the true domicile, where all claims which have not been satisfied in the separate and partial sequestration may be urged.<sup>9</sup>

Where the exclusion of a claim discharges the obligation, the same principles are to be applied (*cf.* judgment of the Supreme Court of Appeal at Kiel, 5th December, 1840. Seuffert, 8, p. 163). But if its result is merely to shut the claimant out from sharing in the assets, this exclusion cannot be made good in a foreign country. The foreign trustee in bankruptcy must, in the circumstances, answer in an action for hypothecating any landed property of the debtor in this country, without being able to plead the exclusion of the personal claim which has taken place abroad (judgment of the Supreme Court of Appeal at Cassel, 5th December, 1829; Strippelmann, 4, p. 184).

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the domicile of the debtor, or are to be performed there, and, as a rule, a process of bankruptcy takes place there. Story, § 351a, recognises that if, for instance, both parties, creditor as well as debtor, have their domicile at a place where the latter fails, and is, in accordance with the law of the country, freed by bankruptcy from his contract obligations, it is not possible to understand why the operation of these laws should not be extended to the contracts of the same parties in another country.

<sup>9</sup> [The doctrine of this paragraph is by no means generally recognised, except in so far as regards the rule that foreign creditors claiming in a sequestration must recognise its effect on their obligations. For a comparison of the different views of foreign bankruptcies, taken by particular systems of law, *cf. infra*, note on § 128.]

## (13.) EXTINCTION OF OBLIGATIONS BY LIMITATION OF ACTIONS.

## § 79.

Legal authorities have discussed at great length and with much divergence of opinion the question by what local law the conditions which bring into play the limitation of personal actions, with all its consequences, are to be determined. We may distinguish four different theories.

According to the first theory this limitation is merely a form of process for dismissing claims, and is subject therefore to the law recognised at the seat of the court.<sup>1</sup> It is further said that the statutes of limitation are designed to prevent actions upon claims of long standing—which have probably been discharged—in the interests of general peace and security; and therefore the law will not permit actions of the kind to be brought before the courts by foreigners or by natives, with reference either to contracts concluded at home, or to those concluded or to be performed abroad.<sup>2</sup>

But the right of action is something more than a mere matter of procedure: such rights as are confined in their operation to some particular suit, and the existence of which depends upon the institution of that suit, are mere matters of procedure. Just as it is from no mere rule of procedure that a natural duty, which has no appropriate action, is therefore an imperfect obligation from the first; so neither is it a matter of mere procedure that an obligation, which at first was perfectly valid, should by the lapse of time during

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<sup>1</sup> Huber, § 7; Hommel. *Rhaps. Quæs.* vol. ii. obs. 409, No. 16; Seger, pp. 25-6; Mühlenbruch, § 73; Weber, *Natural Obligation*, § 95; Burge, iii. p. 878 (see below, note 11); Wheaton, § 94, p. 125; Story, § 576; Holzschuher, i. p. 76; Beseler, i. p. 157; Mittermaier, § 31; Judgment of the Privy Council at Berlin, 11th April, 1825 (Simon & Strampf, i. p. 325); of the Supreme Court at Berlin, 22nd June, 1844 (Decis. 10, p. 102); of the Supreme Court of Appeal at Darmstadt, 10th October, 1840 (Seuffert, xii. p. 446). In these decided cases the place of action and the domicile of the defender were the same. The judgments of the Supreme Court of Appeal at Celle, 28th May, 1850, and 6th February, 1855 (Seuffert, viii. p. 12 and p. 324) take as their principle the consideration that laws as to the limitation of actions have a distinctly compulsory character.

<sup>2</sup> So, particularly, Oppenheim, p. 378.

which it might have been made effectual, fall back into the position of a natural obligation. Besides, we must remember that by many codes of law the operation of such an extinctive limitation or prescription in the case of personal rights of contract is not limited to the restriction of the privilege of suing upon them. For instance, is it not something more than the obligation as a ground of action that is touched by the provision of the Hanoverian law of 22nd September, 1850, denying the competency of pleading personal claims by way of compensation,<sup>3</sup> or by a law which declares that after the lapse of the prescriptive period the obligation is discharged?<sup>4</sup> In such cases even the adherents of this theory hesitate to apply the *lex fori*.<sup>5</sup>

The first reason assigned cannot therefore be held sufficient to support the theory; neither can the second.

The provision that action on certain claims must be brought within a certain time does not mean that actions upon such claims shall not be investigated by the court at all; on the contrary, it is in the option of the defender whether he shall or shall not plead prescription,<sup>6</sup> and in any case there is nothing to prevent determinations being judicially given as to the previous existence of prescribed obligations, which come under consideration as incidental or prejudicial points.

<sup>3</sup> The like is the case according to the Code Civil, arg. Art. 1291; Zacharia, iv. § 653; ii. § 262, note 6.

<sup>4</sup> Cf. Story, § 581 and § 267 *ad fin.*; Prussian A. L. R., i. 6, § 54: "If a person omits to bring his action of damages for wrong suffered, except in the case of a contract, within three years after the nature of the claim and the person responsible to him are within his knowledge, he loses his right."

<sup>5</sup> Story, as cited above.

<sup>6</sup> Against determining it by the *lex fori*, see Seuffert, Comm. i. p. 262; Renaud D. Privatr. i. § 42 *ad fin.*; Wächter, ii. pp. 410-11; Savigny, § 374; Guthrie, pp. 249-50; Judgment of the Supreme Court at Berlin, 30th Oct. 1855 (Striethorst, xix. p. 70); of the Supreme Court at Stuttgart, 1st July, 1852 (Seuffert, viii. p. 2); of the Supreme Court of Appeal at Lübeck of 30th Sept. 1848 (Jurisprudence of the Supreme Court of Appeal on the subject of bills, p. 161); Judgment of the Court of Appeal from the Rhine at Berlin, 8th Oct. 1838 (Volkmar, p. 249), 6th March, 1843 (Seuffert, ii. p. 163); Opinion of the Faculty of Law at Göttingen, 31st Jan. 1837, in accord with an opinion of the Faculty of Law at Jena on the same subject (Jurisprudence, pp. 224-227); Judgment of the Supreme Court of Appeal at Celle (Magazine of Hanoverian Law, ii. p. 438).

• Upon the consideration that prescription, as we have shown, belongs to material private law, rests the second theory which proposes that the local law to which the obligation is subject generally should rule in questions as to the prescription of actions.<sup>7</sup> And indeed, according as the place of execution or the place of performance of the obligation is held to regulate it, so too is the one place or the other assumed as regulative on the question of prescription.<sup>8</sup>

It does not, however, by any means follow from the fact that the prescription of actions belongs to material law, that it is to be ruled by the law of the place of execution or of performance, because the obligation itself must be construed by one or other of these laws. In particular, it cannot be conceded that parties have, by virtue of their contract, a right to a definite period of prescription, which is the reason assigned generally for the application of the law of the place

<sup>7</sup> Cf. Judgment of the Supreme Court of Appeal at Munich, 11th June, 1853 (Seuffert, xii. p. 447); Judgment of the Senate of the Rhine in the Supreme Court at Berlin, 12th Oct. 1858 (Striethorst, xxx. p. 300).

<sup>8</sup> See the former view in Hert. iv. 65; Cocceji de fundata, vii. 12; Ricci, p. 539; Reinhardt Ergänzt, i. 1, p. 32; Renaud, i. § 42 *ad fin.*; Kori, iii. p. 12; in the draft of commercial code for Würtemberg, Art. 1000, and in a judgment of the Supreme Court of Austria, 9th June, 1858 (Goldschmidt, Archiv. für Handelsr. ii. 1, p. 135); the latter view in Bartolus in L. 1, C. de S. Trin. No. 19; Alderan Mascardus, Concl. 7, No. 75 (because at the place of payment "*contracta est mora*"); Burgundus, iv. 28 (because prescription is akin to payment); Massé ii. p. 108, who remarks, in agreement with Troplong (Prescription No. 38): "*La prescription afin de se libérer est en quelque sorte la peine de la négligence du créancier. Or dans quel lieu le créancier se rend il coupable de cette faute? C'est évidemment dans le lieu où il doit recevoir son payment. Donc il encourt la peine établie en ce lieu.*" Savigny, § 374; Guthrie, p. 250; Seuffert, Comm. i. p. 262; Schäffner, p. 111; Heffter, § 39, note 5, pronounce in favour of the law which regulates the material stipulations of the contract, without saying whether they mean the law of the place of execution or of the place of performance. So, too, the judgment of the Supreme Court of Appeal at Celle cited in note 6, and at Berlin 30th Oct. 1855 (Striethorst, xix. p. 70). See, too, Wächter, ii. pp. 411-12, who, at the same time considers whether and how far the law of the place of action lays down absolute rules as to prescription apart from the autonomy of parties, and thus in the end comes to the conclusion that, as a rule, the law of the place of action rules. Foelix, i. pp. 238-41, declares himself as doubtful.



of execution or of performance. Although, as we have seen (§ 69), the effects of a contract are not to be held as the tacit agreement of the parties, still we cannot hold any right to be in accordance with the spirit of the contract which, if tacitly implied in it, would be at variance with the express will of the parties. But the express will of the parties applies only to the due performance of the contract, whereas, if we were to assume that a right to any particular term of prescription was implied in the contract, we should have to suppose that at the very outset of their contract parties were contemplating a breach of it, and there could not be a more flagrant contradiction of the *bona fides* to be observed in all contract relations than this. This view would make the law of prescription a premium upon a breach of contract instead of a penalty upon a negligent creditor, and a protection against claims of long standing and of little substance.<sup>9</sup>

We cannot, obviously, assume that the intention of parties was expressly directed to the period of prescription recognised at the place of execution or of performance, because the contract happens to have been executed or to have its place of performance abroad;<sup>10</sup> and there can be no question of a period of prescription in accordance with contract, when we come to deal with obligations which are not grounded on contract.

Finally, the following considerations will serve to exclude the application of the *lex loci contractus*:—If the period of prescription were in reality a *jus quæsitum* of the parties bound up with the origin of the obligation, a new statute, introducing a period of prescription, could not be applied to claims which arose before the passing of the Act. But this result is certainly incorrect; for if that were so, then the very oldest and most dubious claims would be withdrawn from its operation. Parties, too, would be able, by settling upon any foreign place of performance they pleased, or by making a journey abroad, or by dating a contract from some foreign town, to exclude the period of prescription settled by the law of their own country,—a result at variance with the

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<sup>9</sup> Lord Brougham, in *Don v. Lippmann*, 5 Cl. and Fin. p. 1; Story, § 579, note 1, p. 722.

<sup>10</sup> Gand specially puts his argument upon the intention of parties, Nos. 739, 740.

prevailing view of the common law of Rome, and the express enactments of particular systems.<sup>11</sup> If, then, as we must assume, in accordance with the law of all civilised peoples, the law of prescription is an institution intended to give security to general intercourse, how can we say that it is the intention of the law to withdraw the property of our own citizens, and their relations to that property, from the protection of this principle, because a contract is concluded or is to be performed abroad ?<sup>12</sup>

The reasons last adduced meet the peculiar view of Pothier,<sup>13</sup> who proposes that the law of the creditor's domicile should rule. The only principle on which this view can be supported is one which we have already, in dealing with the law of things, shown to be incorrect—viz., that a man cannot lose any right except in accordance with the law of his domicile.<sup>14</sup>

The last theory proposes that the domicile of the debtor should rule, and this is, as a matter of fact, justified by the object which lies at the bottom of all prescription of personal actions. The debtor is by this means to be protected against doubtful claims, which probably are unfounded or have been discharged;<sup>15</sup> and by this means the general security of law will be advanced. But if this rule is to attain its object, it must extend to all the obligations of our subjects, as, conversely, it is not to be applied to the obligations of foreigners who remain in our State temporarily only, and do not execute or propose to perform in this country most of the obligations which they undertake. If the law of prescription is not extended to all obligations undertaken by our subjects, the result will be that if, for example, there was no such thing as limitation or prescription of actions in the law of the place where the obligation arose, or was to be performed, the creditor would have it in his power to disturb the legal security of our subjects for ever by these claims of long standing ; and, conversely, if foreigners happened to be sued

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<sup>11</sup> Cf., e.g., the Hanoverian law of 22nd September, 1850, § 12.

<sup>12</sup> Thöl, § 85, note 9.

<sup>13</sup> De la Prescription, No. 251. (Cf. Fœlix, i. p. 239, note 1.)

<sup>14</sup> Cf. § 64.

<sup>15</sup> See Savigny, v. § 237 ; Blackstone, iii. p. 307-8 : "*The use of these statutes of limitation is to preserve the peace of the kingdom.*"

in this country, the application of our laws would imperil the legal security—the whole object of this rule of law—not merely of the creditor, but of the debtor also in the highest degree.<sup>16</sup>

It might be said that this consideration is authoritative for the *judex domicilii* of the debtor, but not for any other judge; but if our law, in obedience to the object of prescription, applies our period of prescription to all obligations undertaken by our subjects, how can it be supposed that it will refuse to concede the same right to any other State? We must recollect, too, that, as a rule, action will be raised at the debtor's domicile, and that, therefore, in the limitation of actions there is an indirect reference to the law which prevails at the domicile of the defender.<sup>17</sup> If, as we have shown above, the limitation of actions cannot be held to be a right of the parties, arising out of the terms of their contract, we shall not disappoint any well-founded expectation of the creditor by shutting out of view the law of the place of execution or of performance, since it is always uncertain whether the debtor may be forthcoming at the place of execution or of performance, or will be in possession of property there; and whether, therefore, a decree in any action could be put into execution without the assistance of the *judex domicilii*.

But the object of the law of prescription will require an

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<sup>16</sup> Merlin, Rép. Prescription, i. § 3, No. 7 (Fœlix, i. p. 239); Pardessus, No. 1495; P. Voet, 10, § 2; J. Voet, Comm. in Dig., 44, 3, § 12; Boullenois, i. p. 365, pronounce for the *lex domicilii* of the debtor. But see Boullenois, ii. p. 488; Pöhl's Law of Bills, p. 655; Thöl, § 85, note 9. We may also include English and American authors. Although they take the *lex fori* as their rule, yet their view comes to coincide with that taken in the text, since by English and American common law personal actions have to be brought at the debtor's domicile. Cf. Burge, iii. p. 880. [Cf. *infra*, p. 326.]

<sup>17</sup> See *supra*, note 1. The judgments which I have examined, in which the law of the place of action, of execution, or of performance has been held to rule, almost all relate to cases in which the domicile of the defender was identical with the place of action, and with the place of execution or of performance respectively. Cf. the judgment of the Supreme Court at Berlin of 16th November, 1858 (Striethorst, 30, p. 361). The ground taken in the text was expressly assigned as justifying the judgments of the Supreme Court at Berlin, 14th February, 1855 (Striethorst, 12, pp. 138-39, and 19th July, 1854; Decis., vol. xxviii. p. 70). Cf., too, the judgment of the Cour Royale de Paris of 29th March, 1836 (Sirey, xxxvi. 2, p. 457).

exception to be made to the general rule in the following case:—If one carries on a permanent trade abroad—*e.g.*, possesses a trading establishment, or a manufactory, or a farm there, or is at some foreign educational seat<sup>18</sup>—and contracts debts there in consequence of this special legal position, both parties will, in such a case, undoubtedly expect that it will be possible to raise an action on the spot, if there should be occasion to do so, and not at the domicile of the debtor.<sup>19</sup> To determine questions of prescription by the law of the proper domicile, so long as this state of matters exists, would disturb the security of the law. Besides, it cannot be said that the law of prescription in force at the domicile should apply to the prescription of claims which would not, as a rule, be sued upon at that domicile. If that permanent relation comes to an end—if, for instance, the trader or manufacturer gives up his foreign establishment, or the student leaves the university—the same rules come into play as in the case of an alteration of the domicile of the debtor.

It is urged against our theory, that if the debtor's domicile is to rule, it will be in his power, by a change of domicile, to withdraw at pleasure the creditor's right from him,<sup>20</sup>—*e.g.*, if there is a prescription of ten years recognised at the debtor's first domicile, and one of five at his subsequent one, the debtor by acquiring this new domicile after the lapse of five years, will at once extinguish the creditor's right. But this is not by any means the result of our theory if correctly handled. The right of action will not be subject to the law of prescription of the new domicile till the moment when the debtor acquires that domicile. Up to that moment the conditions of prescription are to be determined by the law of the former domicile—*e.g.*, if by that law half of the period of prescription has run, so, by the law of the new domicile, the same proportion will be held to have run. The creditor would, therefore, in the case put, have still a period of two

<sup>18</sup> *E.g.*, a student contracts alimentary debts at the university town where he studies.

<sup>19</sup> In many cases Roman law would find that the domicile was on the spot. Cf. the provisions of German treaties as to jurisdiction given by Krug, p. 28, §§ 10, 11 of the First Draft of a universal code for Germany. [Cf. *infra*, p. 326.]

<sup>20</sup> Savigny, § 374 ; Guthrie, p. 250, note v.

and a half years within which he could bring his action at the new domicile. This is the same principle of calculation as the Roman law applied to the ten and twenty year periods of acquiring rights *inter absentes* and *inter presentes*.<sup>21</sup> (Cf. Puchta. Pandekts. § 156, Nov. 119, c. 8.) From this, too, it follows that a right of action, once extinguished, can never be revived by a change of domicile.<sup>22</sup>

There is nothing inconsistent with our doctrines in the various provisions for the interruption of prescription, and the privileges accorded to particular persons.<sup>23</sup>

The question, whether a period of prescription once begun has been interrupted, is identical with the question, whether the period antecedent to the interruption is to be counted, and the question whether a particular person has a privilege with reference to prescription, is part of the question whether the claim in question will demand an exceptionally long period for the creation of a prescription.<sup>24</sup>

#### Note H, on § 79.

[The theory advanced by the author has not been confessedly adopted in any of the continental systems, nor in England, America, or Scotland; although, as the author remarks, those countries which have adopted the *lex fori* as the determining consideration, have practically adopted

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<sup>21</sup> Many modern statutes reckon the beginning of the prescription against certain claims as from the last day of December (*e.g.*, Hanoverian law of 22nd Sept. 1850, § 5) of the year in which the obligation originated, without regard to the real day on which it actually did originate. In the spirit of these laws it must be assumed, for the purposes of calculating the period of prescription, that the debtor changed his domicile on the last day of December in the year in question. Weber (Natürl. Verbindlichkeit, § 95), who seems to make the law of the place of action, but really makes the law of the domicile of the debtor, his rule, thinks that prescription must begin to run anew when the debtor changes his domicile. See against that, Savigny, § 374; Guthrie, p. 249.

<sup>22</sup> Cf. the judgment of the Supreme Court at Berlin of 19th July, 1854 (Decisions, vol. 28, p. 70). [This is not so by the law of England, cf. *infra* p. 326; but is the law of America, Wharton, § 538.]

<sup>23</sup> Judgment of Supreme Court at Berlin, 15th January, 1845. Cf. Koch on § 33 of the Prussian A.L.R.I. 1 (p. 45).

<sup>24</sup> On the privileges of legal persons, and persons under curatory, see § 44, note 7.

the same rule of interpretation, since the action for implement will almost always be brought at the place of the debtor's domicile; and in defence of this rule arguments have been used which are more proper to justify the rule laid down in the text.

The main conflict has been between the law of the *forum* and the law of the place to which the contract concerned properly belongs. The latter—the *lex loci contractus*—has been sanctioned by some French writers, such as Fœlix and Demangeat. The former says (i. p. 241, § 100)—“This opinion” (that the law of the place where the action had its origin—*i.e.*, where the contract was made—should rule) “is perhaps the best established in theory, and has been adopted by the courts of Douai and Paris;” and the commentator, Demangeat, at the same place, after enumerating the various possible rules, selects this as the prevailing rule, and fortifies his selection by the citation of a series of French decisions. To these cases may be added a decision of the court at Leipsic on 5th March, 1877, in the case of *Hervey v. Engelbert*, and a decision of the Tribunal of Commerce of Moscow on 17th March, 1877, in the case of *Blomberg v. Wahlberg*. In the latter case the drawer of a bill payable to order, the bill being drawn in Poland and accepted there, sued the acceptor, a domiciled Russian, in the courts of Russia. The period of prescription on such an obligation is in Russia ten years—in Poland thirty. The Russian pleaded his prescription, but the court held the period of prescription to be determined by the *lex loci contractus*—*viz.*, Polish law. This, too, was the doctrine sanctioned in Scotland by an unanimous judgment of the Court of Session in the case of *Don v. Lippmann*, 20th Jan. 1836, 14, § 241. We shall see that that judgment was reversed by the House of Lords upon appeal, on the authority of the Institutional Writers as well as on general principles; but the decision lays down the rule so clearly that it is worth while, since the opinions of jurists on the subject are so much divided, to quote a few sentences from the opinion of Lord Corehouse, well known to Scottish lawyers as a most learned and accomplished judge. He says—“To decide the question of prescription, as applicable to the bills,” for the contents of which the action was raised, “it is neces-

sary to enquire whether the debt sued for is a French or a Scotch debt, and that depends in this case on the point whether Scotland or France was the place where the bills were payable. If they constituted a Scotch debt, it is plain they are subject, not to the French quinquennial, but to the Scotch sexennial prescription. . . . On the other hand, if France was the place of payment, and if the bills in consequence constituted a French debt, the case must be viewed in a different light. Our decisions have not been uniform on this point, but it seems the better opinion, that if a debt be payable in a foreign country, the law of that country must apply, in so far as its extinction is concerned, although the debtor resides and must be sued in Scotland." This, we repeat, is not now law in Scotland, although it may be taken as a statement by an eminent jurist of the principle on which he held that such questions should be determined. That the law of the place of the obligation to some extent influences the application of prescription is admitted by the very authorities who have established the *lex fori* as the rule for England and America. The American courts have held that a defender who is free by the *lex loci contractus*, and has resided in the territory of that law during the whole of the period necessary for his release, cannot be afterwards sued in the court of a foreign country to which he has proceeded, if the prescriptive period there is longer (*Walworth v. Routh*, 14, A. 205; *Story*, § 582; *Wharton*, § 538), and Lord Brougham, in giving judgment in the case of *Don v. Lippmann* (26th May, 1837, 2 Shaw & Maclean, p. 730), adopting this view, said—"There is no occasion, with a view to the decision in this case, to question the doctrine laid down by Dr. Story in his able work on the conflict of laws, and approved of by the Court of Common Pleas in *Teriber v. Steiner*, that if the *lex loci contractus* makes the obligation wholly void after a certain time, and if the parties have resided within the jurisdiction during the whole of that period, it may be taken as the guide of the court where the action is brought."

The law of the place of the contract is also, by the law of countries which as a rule adopt the *lex fori*, allowed to affect the period of prescription upon a debt in this way, that if a debtor, during the subsistence of his debt, removes to another

country where a shorter prescription than that of his own country avails to extinguish the debt, although he cannot be sued in the courts of that foreign country, he will, on returning to the *locus contractus*, be liable to action during the period of prescription there recognised. In the case of *Richardson v. Countess of Hadington*, 16th June, 1824, 2 Shaw's App. 406, the House of Lords held that a person who had contracted debts in this country and had afterwards gone to Russia, where a decennial prescription prevails, and remained there for upwards of ten years; was yet liable to be sued on returning to Scotland throughout the years of the long prescription. In that case the *lex fori* and the *lex loci contractus* were the same, but it is upon the applicability of the latter to the prescription that the judgment to a considerable extent proceeded.

But although there is thus a considerable body of authority in favour of the *lex loci contractus* as the rule, later decisions on the continent have tended to establish, and in England have beyond question established, both for that country and Scotland, the *lex fori* as the rule, although Bar, in a pamphlet on International Law published in 1882, says: "The only serious doubt is whether we should prefer the law of the contract or the law of the debtor's domicile, and practice as well as literary authority in Germany, recognises more and more clearly that the choice lies between these." In England the courts have made the *lex fori* so exclusively the rule, that they have thrown aside the qualification admitted by Lord Brougham *ut supra*, and have established both for themselves and Scotland, that so long as a claim is admissible by the *lex fori*, it matters not that the law of the contract has extinguished it (Westlake, p. 254, and cases there cited). The law of America follows the same rule as it is laid down by Story (Wharton, § 535); the Supreme Courts of Berlin and Warsaw have taken the same course; and so, too, have the later French decisions. The authorities on the law of England are collected by Westlake, p. 253. The leading authority on Scotch law is the case of *Don v. Lippmann*, cited *supra*. Lord Brougham says, at page 724: "Limitation of action belongs to the head of remedy, *ad decisionem litis*, as some jurists term it, or *ad tempus et modum actionis*, as others express themselves," and is, therefore, subject to the law of the court to



which appeal is made. This decision has settled the law in Scotland, and this law has, like that of England, taken a further step and, as is laid down by Mr. Dickson (On Evidence, § 530)—“the Scotch Court is not bound or entitled to give effect to a prescription of either of those natures”—*i.e.*, limiting the mode of proof or the right of action—“prevailing in the *lex loci contractus*.” It is worth while to note that Lord Brougham rejects the authority of the *lex loci contractus* on grounds similar to those urged by the author. Limitation or prescription of action, he argues, is no part of the contract, and cannot have been in the contemplation of parties: “nothing can be more violent than the supposition that the breach of the contract is in the contemplation of parties, and, indeed, nothing more contrary to good faith. It is supposing that when men bind themselves to do a certain thing they are contemplating not doing it, and considering how the law will help them in the non-performance of a duty.”

Acting on the principles of this decision the Scotch courts have held that where a limitation, such as the limitation of the liability of a cautioner in a bond under the Act 1695, c. 5, for seven years, is truly a condition of the contract, then the *lex loci contractus* will apply; it is part of the contract, and not a regulation of the method of enforcing a remedy (*Alexander v. Badenach*, December, 1843, 6 D. p. 326).

With reference to the latter part of the paragraph in the text, as to the period from which prescription runs in the event of a change of domicile, a case decided by the Supreme Court of Posen (*Wiernzowski v. Cegeilka*, 18th March, 1875), may be cited: there a defender, who had, since incurring an obligation, become a Prussian, was sued by another Prussian upon that obligation; he pleaded the Prussian prescription of two years, and that as the rule of the *lex fori* was sustained; but it was only allowed to run from the time at which he first became amenable by domicile to the jurisdiction of the Prussian court.]

#### (14.) TRANSMISSION TO HEIRS.

##### § 80.

The following principles appear to determine the question whether a contract obligation descends to heirs.

The local law, in conformity with which the heir enters upon the succession, will in the first instance determine what obligations<sup>1</sup> must be taken over by him as a condition of taking up the succession. But before the obligations in question can bind the heir, this effect must be also attributed to them by the law to which the obligation is in itself subject.

Thus, the heir of a person domiciled in a country where the common Roman law is in force,<sup>2</sup> would not be bound to carry on a partnership in which his predecessor had been engaged in France, although the contract of partnership by the force of special statutory provision does in French law pass to heirs.<sup>3</sup>

Conversely, by the common law of England, the heir in heritage is not, as a rule, bound by the simple contracts of his predecessor, but only by an "instrument under seal," which specially provides that heirs shall be liable. By the common law of Rome, an obligation on a contract transmits to heirs. A simple obligation which must be ruled by the English law as the law of its place of execution, cannot therefore be made good against the heirs of the debtor, although they are domiciled in a country where the Roman law is recognised.<sup>4</sup>

That the obligation should on its other side pass to the heirs of the creditor, it is necessary that the law to which it is in its origin subject, and the law which regulates the succession, should both provide for this.

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<sup>1</sup> The heir never undertakes more than what is fixed by the law under which he takes the succession. Cf. § 113, as to the law which regulates the entry upon an inheritance.

<sup>2</sup> Cf. L. 40, D. pro socio, 17, 2 ; Arndts. Pandekts, § 319, 2.

<sup>3</sup> Code Civil. Art., 1868.

<sup>4</sup> Story, § 268, and the decisions there cited.

(15.) INTERPRETATION OF CONTRACTS—REDUCTION OF CONTRACTS, PARTICULARLY *læsio enormis*—DISCHARGE BY REASON OF FAULT IN THE SUBJECT—*Locus pœnitentie*—RIGHT TO RESILE AFTER EARNEST OR ARLES HAS BEEN GIVEN—REDEMPTION—RESTITUTION—EFFECT OF CONDITIONS UPON CONTRACTS—DISCUSSION OF PARTICULAR CONTRACTS.

### § 81.

The interpretation of contracts is by some authors taken in so wide a sense that they include in it the import of obligations, in so far as that may be varied at the pleasure of individuals. But it will be more correct<sup>1</sup> to limit the discussion of the interpretation of such legal transactions, as Savigny does,<sup>2</sup> to the resolution of doubts which arise upon their verbal construction. There can be no definite rule given for the interpretation of contracts in this sense which will cover all cases that may arise in International Law any more than the interpretation of contracts within one territory can be brought under one rule; the two questions are precisely the same. In the one case, as in the other, all turns upon ascertaining from the words and acts of the parties, and from circumstances, what their true intention was.

The question, however, what local law rules the transaction is indirectly of importance to this extent—that if *bona fides* requires the application of the law of the place where the contract was made, the language of the contract must also be read according to that law. This connection is not recognised by Savigny, and he therefore arrives at the contradictory result that, whereas the application of the local law rests upon the presumed will of parties, and for that purpose there must be an universal application of the law recognised at the place of performance, yet, in interpreting contracts, in so far as the construction of the language and terms employed

<sup>1</sup> Cf. *supra*, § 69.

<sup>2</sup> Savigny, § 374; Guthrie, p. 244.

is concerned—which surely depends as much upon the presumed intention of parties—quite a different law is to prevail.<sup>3</sup>

The language or dialect used by the parties seems of special importance, and so, too, the place in which they enter upon their contract, and, in the case of contracts between persons who do not meet, the place from which the relative papers are dated.<sup>4</sup>

The rules of interpretation laid down by Roman law—by which in cases of doubt the interpretation is to be against the debtor, the seller, and the lessor<sup>5</sup>—do not operate against our theory. They dealt with the interpretation of contracts in which there could only be one language, and do not touch

<sup>3</sup> Most writers recognise how closely the interpretation of a contract is connected with the local law to which it belongs, cf. Story, § 272, 280. But those who say there can never be a discrepancy certainly go too far. See, on the other hand, Boullenois, ii. pp. 494-8. It may, undoubtedly, here be of importance in this connection that a person has resided in a foreign country for a considerable time. Under certain circumstances, in such a case, a party would use the language of that foreign country, and not that of his own country.

[A charter-party granted by a German to a Spaniard, for delivery of a cargo at Hamburg, does not require to be read according to the law of England because it is in English. That is a circumstance to be taken into account along with others, but is not in itself conclusive as to the law that is to rule (Court of Appeal at Hamburg, 6th September, 1866).]

<sup>4</sup> Judgment of the Supreme Court of Appeal at Lübeck, reported in Goldschmidt, *Zeitschrift für des gesammte Handelsrecht*, ii. pp. 140-2. A firm in Bremen had contracted with an English ship-owner at Southfield, in the English language, and in the ordinary English form. The court interpreted the penalty clause added to the contract in conformity with English custom, in the way in which it would be read in England, and not as it would be read in Germany; because, not only was the contract made in England, but the parties, one of whom was an Englishman, had used a form which was customary in England. (By English law such a clause gives no substantial right, for the party entitled to plead it can, in spite of its existence, recover no more than the amount of damage he can instruct.) Wächter (vol. xix. p. 117) gives this case: An insurance company at Leipsic had in its printed conditions excepted the case of destruction by rioting. In the case of a conflagration which took place in a foreign country, the question arose whether the legal notion of rioting was applicable to the circumstances of the case, since the laws of different countries are not at one in their definition of the term? Wächter's ruling is that the question must be referred to the terms of the law of Saxony. Cf. Savigny, § 374; Guthrie, p. 244, note D.

<sup>5</sup> L. 26, D. de reb. dub. 34, 35; L. 38, § 18; L. 99, pr. de V. O. 45, 1.

the question as to which language shall decide where several may possibly be applied.<sup>6</sup>

The reduction of contracts is subject to the same law as that by which their validity is to be determined. Reasons of reduction are truly nothing else than imperfect invalidity.<sup>7</sup> The reduction or discharge of a sale by reason of damage to more than the extent of one-half,<sup>8</sup> or from deficiencies in the subject sold, the right to resile,<sup>9</sup> the right to do so on renouncing earnest or arles given, the right of redemption, and of restitution against a bargain, are all applications of this rule.<sup>10</sup>

The operation of a condition upon a contract must undoubtedly be determined not by the law of the place of performance, but by the law which regulates the transaction for other purposes—*i.e.*, the law that prevails at the place where the contract originated.<sup>11</sup> The performance or the failure of the condition makes the contract independent of the condition, and then it stands as if it were unconditional, or had never been struck between the parties.

We now propose to touch upon some contracts of special importance. We have already discussed the contract of sale from more than one point of view. Of particular importance is the question as to the passing of the property and the risk in sale. The former part of the question we have already dealt with (cf. § 61). It is enough to say that, in consequence of that doctrine, the intention of the parties to

<sup>6</sup> Savigny, § 374; Guthrie, p. 247.

<sup>7</sup> Rules as to the reduction of contracts belong to material law. Judgment of the Supreme Court at Berlin, February 11, 1858 (Striethorst, Neue Folge. 2nd year, vol. i. p. 51); cf. Massé, p. 158.

<sup>8</sup> Fœlix, i. p. 254, § 109; Hert, vi. 4; Massé, p. 220. (In the sale of immoveables, the *lex rei sitæ* as a rule will prevail; see Massé, p. 223.)

<sup>9</sup> Boullenois, ii. p. 454; Fœlix, i. p. 254.

<sup>10</sup> See, generally, J. Voet, in Dig. 4, 1, § 29; Story, § 331; Wächter, ii. p. 404. Wächter, no doubt, only applies this in so far as he has to deal with rights which parties may renounce. This restriction cannot be approved in the light of the general principles here assumed (cf. *supra*, § 66). See, too, Savigny, § 374; Guthrie, p. 249; Renaud, D. Privatr. i. § 42, note 26; and the judgment of the Supreme Court of Appeal at Lübeck, cf. 30th January, 1850, reported by Römer, ii. p. 228. As to restitution, see *supra*, § 56.

<sup>11</sup> Hert, iv. 54; Burge, iii. p. 754; Massé, No. 103.

transfer or not to transfer the property is to be determined by the law which generally rules the obligation ; but the further questions—viz., whether this intention is sufficient, whether any particular forms are necessary for the passing of the property, and what these forms are—are to be determined by the *lex rei sitæ*. But in the case of a contract of sale concluded by means of letters, the law of the domicile of each of the parties will rule as regards his obligation ; and if their provisions are irreconcilable on the question as to whether the buyer or the seller is to bear the loss of the subject if it should perish, then the law which favours the defender is to prevail.<sup>12</sup> For instance, by Roman law the risk passes to the buyer when the contract is complete : by Prussian law, A. L. R. I. 2, § 100, the sale is held to be broken off if the subject of it is by any accident entirely destroyed.<sup>13</sup> Now, in the case of a contract by letters, the buyer who is domiciled in Berlin cannot be required to pay the price at the instance of the seller who is domiciled in Hanover ; but conversely, the seller, if domiciled in Berlin, cannot demand the price from the buyer domiciled in Hanover, while it is always incompetent to claim repetition of a price which has once been paid.

Claims of warrandice are to be settled by the rules which determine in other respects the local law of the contract of sale,<sup>14</sup> and by the same rules, too, is to be settled the obligation of one or the other party to make good to the other the costs of the deeds and the stamp duties.<sup>15</sup>

Contracts of hiring and lease of immoveables are, almost without exception, to be determined by the law of the place where the subject of the contract is. There is still less reason to suppose that there should be exceptions to this rule in such cases rather than in the case of sale, since the contract of lease is bound up with the permanent use, and, as a rule, with the permanent presence of the lessee at the place where the subject of his lease lies. The *lex rei sitæ* determines, then, the con-

<sup>12</sup> See above the general principles given in § 66.

<sup>13</sup> For an exception, however, see i. 2, § 340.

<sup>14</sup> Boullenois, ii. p. 460 ; Molinæus, ad L. i. C. de S. Trin. ; Fœlix, i. p. 230.

<sup>15</sup> Fœlix, i. p. 305.

ditions of tacit relocation, of abatements of rent, and questions as to rent and warning.<sup>16, 17</sup>

All that need be said as to the contract of partnership has been already said in treating of agency.<sup>18</sup>

The law of mandate is of special importance for the completion of contracts by letter. This, too, we have already dealt with.<sup>19</sup>

As regards loan, reference may be made to what has already been said upon interest, the plea *non numeratæ pecuniæ*, and the *Exceptio Sci Macedoniani*.<sup>20</sup> We must dispose of all provisions of particular systems of law, by virtue of which particular persons are declared incompetent to bind themselves by acknowledgment of loan, in the same way as we dealt with the *Senatus Consultum Macedonianum*.<sup>21</sup> We need only note that by the very nature of the contract of loan, the lender is entitled to recover the full amount of the capital he has lent. The result of this is that if it is arranged that payment shall be made at some other place, or if payment actually takes place there, the debtor may no doubt pay in the currency recognised there, but the amount of the debt will be determined by the currency of the place where the loan was made:<sup>22</sup> further, the debtor has to bear the cost of transmission, and if he pays in bills he must make good to the creditor the difference in the rate of exchange between his own domicile and that of the creditor.<sup>23</sup>

We have already<sup>24</sup> attempted to show<sup>25</sup> that the limitations

<sup>16</sup> Demangeat, in his note (c) to Fœlix, i. § 109, p. 250; Story, §§ 270 and 364.

<sup>17</sup> The claim of the freighter of a ship against the owner, if the goods have been damaged in transit, must, therefore, be determined, not according to the law of the place where the damage was done, but by the law to which the contract of affreightment is generally subject. So, too, a judgment of the Court of Appeal from the Rhine at Berlin, of 10th March, 1845 (Seuffert, iv. p. 5).

<sup>18</sup> Cf. *supra*, § 72.

<sup>19</sup> See *supra*, §§ 37 and 73.

<sup>20</sup> See *supra*, §§ 71, 77, 55.

<sup>21</sup> *E.g.*, subaltern officers and students.

<sup>22</sup> Massé, p. 167, No. 124.

<sup>23</sup> Cf. *Grant v. Healey*, cited by Story, § 284a.

<sup>24</sup> See *supra*, § 70, note 4.

<sup>25</sup> The same is true, for instance, of the provision of the Prussian A. L. R. I. 14, §§ 219-20, according to which the capacity to incur debt belongs to the

which some systems of law lay down for the guarantees of women are not to be viewed as limitations of the capacity to act. But in questions arising out of the *Senatus Consultum Velleianum* the *lex domicilii* must as a rule be applied, since the application of that rule, which is the general canon in the law of contracts, is subject to less objection under this head, as the obligation of guarantee has as a rule to be performed at the domicile of the surety, and the parties are therefore directed to the *lex domicilii* of the surety, while the *bona fides* of trade seldom requires that the *lex loci contractus* should be kept in view. If, for instance, the traffic at fairs and markets makes it absolutely necessary to apply the law of the place to the contracts usually concluded there, the like need not necessarily be true of a contract of guarantee connected with some contract of the former kind: it must also be shown to be usual to undertake such contracts of guarantee at that place.<sup>26</sup> The import of the principal contract will regulate the extent of the obligations undertaken by the surety, and therefore to a certain extent the law applicable to them.<sup>27</sup> On the other hand, the conditions under which the surety is bound or is free, although the principal obligation continues, do not depend upon the law that rules it. In this way, too, must the question, whether the surety can plead the *exceptiones excussionis* and *divisionis*, and whether he has the *beneficium cedendarum actionum*, be decided.<sup>28</sup>

#### (α.) DONATION.

#### § 82.

Donation, strictly speaking, only belongs in part to this division of the subject: it is only the promise of donation and the obligations which he who receives the donation incurs towards the donor by acceptance, that we can deal with: the

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question of the capacity to become surety; and subaltern officers, for instance, cannot undertake such an obligation without the leave of their colonel.

<sup>26</sup> Kritz, p. 117, who no doubt justifies it by the consideration that suretyship never gives rise to more than an *actio nascitura*.

<sup>27</sup> Bouhier, chap. 21, No. 197.

<sup>28</sup> We do not mean to say that circumstances may not force us to determine such an obligation by the law that rules the principal contract—*e.g.*, if one becomes surety for an officer of the State, and the obligation can only be undertaken in conformity with the law of the government which he serves



donation on the other hand, in so far as its object is to confer or to transmit real rights, must be assigned to the law of things. But for the sake of connected treatment, and because while we were dealing formerly with the law of things, we could not assume the principles of the law of contract, we shall take the whole subject up now.

1st. The transference or the creation of real rights is subject to the *lex rei sitæ*. If this law requires some particular form for the constitution of a real right to the thing in question by way of donation, that form must be observed, although the contract to give the right should have been made in some other country, where no such form was required.<sup>1</sup> The converse, however—viz., that, if by the *lex rei sitæ* there is no particular form required to pass the property of the thing which is the subject of the donation, while there is a form required by the *lex domicilii* of the donor, the property may pass although the form is not observed,—is not necessarily true, each case being dependent on its own circumstances; for the intention of the donor to transfer the property must be plain.<sup>2</sup>

2nd. The undertaking to make a donation—an undertaking which does not belong to the ordinary obligations of commerce—from its very nature does not as a rule require the application of the *lex loci actus* to protect the good faith of the contract, and therefore we can in this case adhere to the general rule that the *lex domicilii* of the party bound shall rule, and although there is no reason to exclude the rule "*locus regit actum*" from regulating the form of the undertaking to make a donation, the intention of the giver to bind himself validly in conformity with the *lex loci actus* must be apparent from the circumstances.<sup>3</sup>

3rd. Grounds for recall of a donation are to be determined in the same way by the *lex domicilii* of the person under obligation—that is to say, of the donor—before he has made

(Story, § 290). The surety in this case knows, or ought to know, that he can only become surety in the way prescribed by these laws.

<sup>1</sup> Cf. *supra*, § 61.

<sup>2</sup> Cf. *supra*, § 60.

<sup>3</sup> Boullenois, l. pp. 519-23, demands that in every case a donation shall be judicially intimated, if that is necessary, by the law of the domicile of the donor, without regard to the local law of the place of the donation.

the gift, thereafter of the donee ;<sup>4</sup> since in the former case the right of recall frees the donor—in the latter case, puts an obligation upon the donee.

4th. The restrictions imposed upon the donor by the existence of heirs, or of persons having claim to legitim out of his estate, or claims of a similar kind, are all consequences of the rights which these claimants may have upon the estate of the deceased,<sup>5</sup> and are conditional upon the state of his property at the time of his death. They are, therefore, subject to the law under which the succession falls (the *lex domicilii* of the deceased, or the *lex rei sitæ*). If the person whose estate is thus subjected to a claim changes his domicile, then, if the question should turn at all upon the *lex domicilii*, the donation can only be challenged by these claimants in so far as that is competent by the law of his last domicile, and of his earlier domicile at the date of the donation ; for on the one hand assets of the estate, once validly given away, do not afterwards form part of the estate ; and on the other the heirs can ask no more than what the law that regulates the succession, and pronounces them to be heirs, bestows.<sup>6</sup>

We shall return, in dealing with the law of the family, to the restrictions which many systems of legislation place upon the power of donation between spouses (cf. § 97).

#### *Note I, on § 82.*

[It has been determined in France that a person who is restrained in his disposing powers by way of donation during his lifetime, by the law of his domicile or nationality, is so restrained wherever he may be at the time of executing a donation, or wherever the estate which forms the subject of the donation lies, and wherever the donation is to have its effect. Count Garcia de la Palmira, a Spaniard, gave his daughter, the Countess Antonelli, who became by marriage an Italian, a

<sup>4</sup> If the thing given is immoveable, then the *lex rei sitæ* will, as a rule, determine the obligations of the donor and of the donee, according to the general principles of the law of contract. Cf. *supra*, § 66, note 26.

<sup>5</sup> On the principles of Roman law, the *querela inofficiosæ dotis* and *inofficiosæ donationis* are anomalous, since no heir has by Roman law any claim upon the estate of his predecessor while he is alive. It is otherwise by German law. See, too, Code Civil, art. 913 ; Zacharia Civilr. iv. § 586.

<sup>6</sup> Cf. Boullenois, i. p. 276.

share of his real estate on the occasion of her marriage. At the date of the marriage the Count was resident in Italy, and the marriage-contract, in which the gift was contained, was executed there. The estate was situated in France. By Spanish law the donation was illegal; and on the death of the Count subsequently in France, the French courts, applying the law of Spain, declared the donation bad, and gave effect to the contentions of the Count's heirs, who had challenged its validity. The restriction of the Spanish law was held to be a personal disqualification, which followed a Spaniard everywhere (Cour de Paris, 12th March, 1881).]

(β.) NOTES PAYABLE TO BEARER.

§ 83.

These notes are, on the one hand, subject to the principles that regulate the acquisition and the loss of real rights in moveables, and on the other, to the principles of the law of contracts. We have already (cf. § 64, note 22) said all that need be said about them under the former head; and on the latter we have to remark that, although the competency of vindicating such notes may be dependent upon the *lex domicilii* of the holder, or in some cases upon the law of the place where they were acquired, yet the debtor will undoubtedly be discharged, if he pays to the person who is entitled to receive payment according to the law that regulates his own (*i.e.*, the debtor's) liability—*i.e.*, as a general rule, the law of his own domicile.<sup>1</sup>

The same is to be said of the case where by statutory enactment the holder of a note for value, which is payable to the bearer, has the power of taking the same out of the circle, either by noting it for himself, or by the process of having it noted by some Government official.<sup>2</sup> Such a process only binds the debtor in so far as his *lex domicilii* provides that it shall do so. On the other hand, in so far as

<sup>1</sup> This follows from the principles of assignation. Cf. *supra*, § 76.

<sup>2</sup> Cf., *e.g.*, Hessian ordinance of 18th December, 1823, given by Schumm: Discharge of documents of debt that have been lost, Heidelberg, 1820, p. 230.

the claim for recovery of the note is to be determined by the law of the land where this process was carried out, it will rule the relations of the pursuer and defender in any action for recovery of it.<sup>3</sup>

The debtor is always free from any claim at the instance of the holder, if he is free according to the law which originally regulates the performance of the contract. But he cannot be discharged by any other law. From this it follows that a decree of discharge or cancellation of such a note, if it has been lost, can only be obtained under the conditions and before the court<sup>4</sup> prescribed by the law of the debtor's domicile.

It is, however, quite a different question whether or not the person who has lost such a negotiable note, by neglect of some obligation incumbent on him by the law of his domicile—*e.g.*, by neglect of some necessary advertisement—is bound to give up the document, which he has received from the court in place of that which was held to be discharged or cancelled to the holder of that document itself.<sup>5</sup>

<sup>3</sup> In the case of joint-stock companies, the domicile of the company takes the place of the debtor's domicile, even as regards the original shareholders. Cf. Burge, iii. p. 751-52; Story, § 320a.

<sup>4</sup> The *judex domicilii* of the debtor is the competent judge. Cf. *infra*, § 86, p. 352. Sometimes, however, the court of the domicile of the last holder, or the court in whose territory the note was lost, is declared to be competent in the case of inland notes payable to bearer (cf. the Hessian ordinance, cited above). The Hannoverian ordinance of 28th January, 1826, § 4, and the statutes of the Hannoverian Landescreditanstalt, § 49 *ad fin.* promulgated by ordinance of 18th June, 1842, proceed on the principle that the *judex domicilii* of the debtor is competent. The Hessian ordinance, too, tacitly assumes that a decree of discharge of inland notes payable to bearer is all that the courts of any country can pronounce; and the like, too, is enacted by the ordinance of the free town of Frankfurt, 8th July, 1817, Art. 4 (Schumm, p. 234). See, too, Vogt in the *Neue Archiv. des Handelsrechts*, by Vogt and Heinichen, i. p. 31; and the judgment of the Supreme Court of Appeal at Lübeck, reported there of date 20th October, 1856.

<sup>5</sup> The judgment cited in the former note says: "Suppose that a foreign law did not prescribe any rules for the security of trade in reference to such processes of discharge, of the nature of those rules which in Hamburg are considered upon exchange as necessary for avoiding risk and loss in the case of negotiable notes, a Hamburg merchant could not hold himself excused from observing the rules laid down in Hamburg, because of the provisions of foreign law, without making himself ultimately answerable to the person who had lost the note. He must observe the rules which the members of one

## (γ.) LAW OF BILLS.

## § 84.

The object of all traffic in bills is that the creditor shall receive a certain sum of money at a certain time, and generally at a certain place. But since the creditor may find it more profitable to receive this sum, or more correctly speaking its equivalent, at some other place or some other time, he has the privilege given him of transferring his right in the bill absolutely to some other party, and getting his equivalent out of the consideration paid him. To attain these objects, which are not identical with those of a true paper currency, although they resemble them, the obligation in a bill consists of an accurately framed undertaking to pay a particular sum ; and this undertaking, in contrast to the other legal relations which arise between the holder of a bill and the debtor, is visibly expressed in a written declaration of intention, and is governed by this expression of intention alone ; but at the same time, just because the obligation of the debtor is so exactly defined, there is laid upon the holder, in order to uphold the system, and to avoid loss, a series of obligations as to the diligence<sup>1</sup> which is competent to him. And lastly, to ensure the object of prompt payment, there is given to the holder an exceptionally summary process against the debtor, and in many systems of law a special kind of execution against his person.<sup>2</sup>

From these principles we may deduce, with the help of the general principles which regulate the law of contract, what

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trading body are required to observe in their relations to each other, quite irrespectively of the foreign enactment, which may, however, for other purposes, regulate his position."

<sup>1</sup> In a strict sense one cannot conceive an obligation in which the creditor is not under some such obligation on pain of losing his rights. He must always accept performance or demand it.

<sup>2</sup> See Jolly's treatise for different theories as to the nature and definition of bills of exchange ; the more modern literature on the subject is in Pözl's *Critical Quarterly Magazine of Law and Jurisprudence*, 1860, p. 537. The definition given in the text may suffice for the object which we have in view.

territorial law is to determine the particular obligations, rights, and transactions that are to be found in the law of bills.<sup>3</sup>

### § 85.

1st. We have already (§ 55) noticed that the capacity to incur obligations by bills is not to be determined by the *lex domicilii*, except in so far as it is a result of a general capacity to act, such as majority confers. We need, therefore, only apply the general principles of the law of contracts, which, as we saw, undoubtedly refer us as a rule to the law of the domicile of the debtor in the obligation. We must not forget, however, that by reason of the form of the obligation in a bill, as every one is entitled to rely upon the faith of the *littera scripta*, the debtor cannot refuse to allow the place from which his written undertaking is dated to be held to be his domicile.<sup>1</sup> The only exception to this rule would be, if

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<sup>3</sup> The conflict of laws upon bills is dealt with at length by Brackenhöfft in his *Archiv. für Deutsches Wechselrecht*, ii. pp. 129-162, 278-301. Cf. however, Hoffmann's *Ausführl. Erläuterung der Allgem. Deutschen Wechselordn.* p. 597-611.

<sup>1</sup> See the *Allgemeine Deutsche Wechselordnung*, Art. 4, No. 8,—“The place to which the individual or firm drawn upon bears to belong is considered as the place of payment of the bill, in so far as no special place of payment is fixed, and also as the domicile of the person drawn upon.” Art. 97,—“The place of issue is held to be the place of payment, and also to be the domicile of the drawer when there is no proper drawee and there is no special place of payment fixed.” There is the less risk of the principle stated in the text being used as a means of evading the laws that restrict capacity to enter on bill transactions, since the designation of the party, in order to be complete, requires that his true domicile should be given. It is, however, an essential principle for the security of trade, since, if it were not so, the holder of the bill, on the one hand, in order to secure his right of recourse, would in many cases have to make enquiries as to the true domicile of the party liable to relieve him, which the shortness of the time available to him would render impossible (see below, note 18); and, on the other hand, would not be able to test the validity of the undertaking expressed in the bill. By far the greater part of the obligations in a bill are undertaken at the debtor's domicile, and this the indorsee may assume to be the case. But Brackenhöfft goes too far when he maintains (*loc. cit.* p. 139) that the place which the bill states to be the place where its obligations are to be undertaken is really to be so considered in all circumstances. The parties cannot by the terms of their contract withdraw themselves from the operation of the local law. We have an agreement of parties that the place said to be the

the person who took the bill knew when he entered into the contract that the party undertaking the obligation had his domicile elsewhere, or if that were particularly noted on the face of the bill ; but in the former case only if the bill had not in the meantime passed into the possession of some person who knew nothing of that special circumstance, and from whom it had again passed into the hands of its present holder.<sup>2</sup> <sup>3</sup> This circumstance, and the fact that by far the greater part of the obligations under bills are undertaken at

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place of issue shall be held to be so : the law of this place will be applied to regulate everything which parties have it in their power, by a choice of locality, to settle for themselves ; and, besides that, any third party who may have an interest in the bill is entitled, if he is in *bona fide*, to rely upon the *littera scripta* of the bill. It would not, however, be correct to say—with a judgment of the Supreme Court at Berlin (Decisions, 2, p. 137 ; cf. Borchardt, p. 42),—which was no doubt pronounced before the Allgem. Deutsche Wechselordnung—that all that is required in a bill is that it should bear in full, on its face, all the essentials of such a document, and that therefore the truth of the statement as to the place of issue made on the bill cannot be sent to proof. Enquiry might, under certain circumstances, take place, provided of course that the proof admissible in an action as to a bill would show the falsity of the statement. See, too, a judgment of the Appeal Court at Naumburg, 21st January, 1851 ; Archiv. für D. Wechsel Recht, ii. p. 431. The following cases are in point :—A merchant sends to his correspondent in London blank bill forms, merely signed by him, and dated from Ireland, that the correspondent may fill in the name of the drawee, the sum, the place of payment, and the date of issue : these bills will be held to have been drawn in Ireland (Story, § 289). Again, a bill was drawn in Manchester upon a firm established in Boston, and was accepted by a member of the firm then in Manchester in name of his firm. The court held, without any question as to the capacity of the person to draw bills or accept them being raised, that the bill must be treated as if accepted in Boston, and that the diligence done upon the bill in accordance with the law of that place was in order (Story, § 319). [Snaith v. Mingay, 1 Maule v. Selwyn, 87 ; and Grimshaw v. Bender, 6 Mass. 157.]

<sup>2</sup> It is sufficient if the holder was in good faith. A subsequent holder who was not in good faith could never appeal to the rights of a prior holder as his cedent. If the transference of a bill is shown to have been a simulate transaction, it has of course no effect.

<sup>3</sup> The validity of the *littera scripta* will give even *bona fide* holders of a bill no good right to it in questions where there is incapacity to undertake any such obligation in consequence of a general incapacity to act, such as minority creates. There is no legally capable will to give validity to the *littera scripta*. Nor does the general security of trade in bills require any other rule. (See above, §§ 52, 55.)

the domicile of the debtor, explain the view which French and English authorities adopt, that the validity of an obligation upon a bill must be determined by the law of the place where that obligation was undertaken.<sup>4</sup>

2nd. There is no question that, as far as the form of the bill and its transmissions are concerned, the rule "*locus regit actum*" must be recognised. The obligation contained in the bill is validly undertaken if it is in conformity with the law recognised at the place where the declaration of liability is made.<sup>5</sup> But the undertakings of the drawee, the acceptor, and the indorsers<sup>6</sup> are, in questions as to their respective validity,

<sup>4</sup> See Story, § 319; Pardessus, No. 1483-5; see, too, J. Voet in Dig. 22, 2, No. 10. [See *infra*, p. 354.]

<sup>5</sup> Story, § 318; Fœlix, i. p. 177, § 80; Massé, p. 143. The following are important divergences in the rules as to bills:—According to the Code de Commerce, Art. 110, 137-8, the original bill and all indorsements must bear to be for value: that is not necessary by the Deutsche Wechselordnung (cf. Hoffmann, p. 179). By English law bills may be made payable to bearer, but not so by German law (Stephen, ii. p. 114; Hoffmann, p. 190, on Art. 4, 3). The 85th Article of the Deutsche Wechselordnung enacts,—“The essentials of a bill drawn abroad, and of every transmission of it executed abroad, are to be ruled by the law of the place where the bill was drawn or transferred.” See, too, a judgment of the Supreme Court at Berlin of 13th June, 1857 (Striethorst, 24, p. 370, and Borchardt, p. 240). In determining the validity of a bill drawn in Russia upon a domiciled Prussian, but wanting in the statutory stamp, the Prussian judge is bound by no fixed rules, if the courts of Russia have no fixed rules to determine their decision. (On the necessity of a stamp, see generally *supra*, § 38, and a judgment of the Supreme Court of Appeal from the Rhine at Berlin on 29th April, 1844, reported by Seuffert, 2, p. 164.) By a judgment of the Supreme Court at Berlin of 10th July, 1860 (Seuffert, 14, p. 279), the diligence peculiar to bills may follow upon promissory notes issued in America, which do not contain the words “Bill of Exchange,” wherever the Deutsche Wechselordnung is in force. [Any equivalent expression is enough (Reichsgericht at Colmar, 14th June, 1881).]

<sup>6</sup> Judgment of the Supreme Court of Appeal at Lübeck of 1st March, 1844 (Jurisprudenz des O. A. G. zu Lübeck in Wechselsachen, 16-17). Hommel Rhaph. Quæst. vol. ii. obs. 409, No. 5. A judgment of the Court of Cassation at Paris of the 25th September, 1829, in accordance with a judgment of the court at Rouen on the same point (Sirey, 30, 1, p. 150-2), recognises that as regards the validity of a blank indorsement the rule "*locus regit actum*" is to be applied. The principles laid down as to assignation are applicable to the obligation of the debtor in the bill to pay upon an indorsement that has been executed abroad, and, in a corresponding way, to his discharge by payment upon such an indorsement. The result is that the debtor must pay if the indorsement is valid by the law of the place to which it, as a



quite independent of each other, so that, for instance, if the drawer has by some informality failed to bind himself according to the law of the place where the bill was drawn, the indorsement, if the bill be valid by the law of the place where this undertaking was entered upon, may bind the indorser.<sup>7</sup> This follows from the consideration that the debtor in a bill binds himself to pay either absolutely or upon the event that the prior obligant fails to pay; we cannot on the one hand take into account the fact that the debtor may have a right of recourse or of indemnity, nor can we take into account the reason why the prior obligant does not pay, and that reason may be that the principal debtor in the bill has not validly bound himself. It follows, however, from the meaning of the rule "*locus regit actum*," which was explained by us above, and is expressly recognised in the D. W. O.,<sup>8</sup>

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separate legal transaction, is subject; but he is also discharged if he pays in *bona fide* upon an indorsement which would transmit to the indorsee the right to the bill according to the law that regulates his (the debtor's) obligations under the bill. Cf. too, Story, §§ 316a 353c; Fœlix, i. p. 177; Schäffner, pp. 121-2, as to the validity of the indorsement in conformity with the *lex loci actus*. By the D. W. O. bills at usance are not recognised. The papers of the conference upon the statute say on this point (p. 146),—"This question also arose, What view is to be taken of bills at usance, drawn abroad? After a long discussion we agreed that this point had been already decided in the first paragraph of the 76th section (now the 85th)." In my opinion, not only would a bill drawn within the territory subject to this ordinance upon usance by a person domiciled here fail to bind acceptors and indorsers here, but so also would such a bill drawn abroad upon the territory of this ordinance, because, except in the cases of bills given at fairs and markets, there is no rate of usance known at the place of payment. But, again, indorsers domiciled in Germany who indorse a bill drawn abroad upon some place abroad may be liable.

<sup>7</sup> D. W. O. Art. 85, par. 2,—"If, however, the foreign bill, or its transmissions made abroad, satisfy the requirements of our law, no plea can be taken against indorsements subsequently made upon the bill in this country on the ground that the original bill, or previous indorsements, were defective by foreign law." Judgment of the Supreme Court at Berlin, 17th June, 1858 (Striethorst, 28, p. 361; Borchardt, p. 241)—"A foreign bill, in conformity with foreign laws, is to be treated like a good inland bill; and all further operations upon it, such as indorsation done in this country, are to be ruled by the law of this country."

<sup>8</sup> Art. 85, par. 3, "In the same way, indorsations of bills, by which one German is bound to another abroad, have the force of bills themselves, if they fulfil the requirements of the German Code." See, too, Massé, p. 143.

that a bill may be transmitted according to the law of the country to which both parties belong, if one subject of that country undertakes to another, in a valid form, and with the present intention of doing so, the obligations associated with a bill,—and the written terms of the bill will generally determine these beyond a doubt. And, in my opinion, even although the person in whose favour the obligation so undertaken abroad were no subject of this State, the validity of the obligation would have to be determined by the law of the country to which the party binding himself belonged, if it could be shown that he intended to undertake the proper obligations of a bill.<sup>9</sup>

3rd. The law of the place where the bill is drawn or indorsed, and, as in the former cases, the law of the place where either of these operations is dated, will determine the substantial effect of the operation (cf. the principles stated *supra*).<sup>10</sup> Every transmission is independent of every other, even in questions as to the substantial effect thereof; for he who becomes liable to the obligations of the bill is unconditionally responsible (under the modifications which the law that regulates his liability may enact), for the payment of the bill, irrespective of whether this results from legal considerations, because other parties to the bill have not bound themselves validly, or upon actual facts, such as that these persons cannot pay.<sup>11</sup> For instance, by one system of law, the acceptance has no effect if the drawer was bankrupt at the time when the acceptance was given; but the indorsers in such a case, who have incurred their obligations under the

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<sup>9</sup> This might be said, too, upon the special provisions of the D. W. O. The provisions of that statute are in no way complete as regards international law.

<sup>10</sup> Cf. Hoffmann, p. 604. Draft of a commercial code for Württemberg. Art. 1003.

<sup>11</sup> The historical origin of the right of recourse against the indorser bears this out: "The cedent, who at first, when a bill was handed on, accompanied it with an ordinary order, subsequently was in the habit of adding to that an order guaranteed by his own obligation—i.e., a new bill with all its forms, probably upon an eik to the original bill, and then again subsequently transferred merely the order contained in the first bill, with the guarantee of his own obligation, which made it unnecessary to repeat all the forms of a bill, since a part of these could be held as tacitly repeated." Hoffmann, p. 52.

rules of a different system, are nevertheless bound.<sup>12</sup> And in the same way the competency of objections is to be determined by the *lex loci contractus*,<sup>13</sup> unless these are dependent on rules of process, such, for instance, as that any such objection must be instantly capable of verification.

4th. The amount due under the bill is determined by the currency of the place of payment,<sup>14</sup> and similarly the periods allowed for payment and acceptance<sup>15</sup> (cf. D. W. O. Art. 34).<sup>16</sup> The principal or leading obligation in a bill transaction, and the only one which will be put in force if things take their regular course, is the obligation of the person drawn upon; the drawer in issuing the bill refers to the obligation undertaken or to be undertaken by the drawee, and that is fixed by the law of the place where acceptance or payment takes place, or is intended to take place, whereas the obligations of the drawer and the indorser consist merely in taking steps to insure that the drawee on his part shall undertake and perform his part of the obligation.<sup>17</sup>

<sup>12</sup> Story, § 322, *ad fin.* 333. Beseler, iii. p. 368.

<sup>13</sup> Cf. *supra*, § 68, and Story, § 316 and § 353. Fœlix, i. p. 177. Schäffner, p. 121-22.

<sup>14</sup> This follows from what we have said already, § 66, note 25. Cf. too, Massé, p. 168; Story as cited.

[It was decided by the Trib. comm. de Marseilles, 7th Nov. 1871, that the holder of a bill payable in France is bound to accept payment in notes of the Bank of France, having at the time a forced currency, and that although the bill bears that payment is to be in gold, unless there is a separate and special agreement to that effect.]

<sup>15</sup> Pardessus, No. 1495. Massé, p. 196. Judgment of the Supreme Court at Berlin, 10th April, 1848 (Decisions, New Series, 7, p. 342). Massé reports a judgment of the Court of Cassation at Paris of 18th Brumaire xi. in which the date at which a bill at so many months after date drawn in Amsterdam upon Paris should fall due was calculated according to the Republican calendar then in force in France, and not by the Gregorian, which was in force in Amsterdam.

<sup>16</sup> "If a bill is drawn in a country where the old style is still in use, payable so many days after date, and if it is not noted that the bill is dated in the new style, or if it is dated in both styles, the day on which it falls due shall be reckoned according to that day in the new calendar which corresponds to the day of the old calendar which is represented to be the day on which it was drawn."

<sup>17</sup> See, specially, Hoffmann as cited, and the Magazine for Practical Jurisprudence, by Schäffner, Seitz, and Hauffmann, vol. i. 1852, part iii. pp. 47-53, against the theory that would determine the effect of the bill and its transmissions by the law of the place of payment.

5th. The conditions of recourse are to be ruled by the law which determines the liability of that obligant in the bill against whom recourse is desired to be had, and, therefore, as a general rule, by the law of the place from which the indorsation or the bill itself, as the case may be, is dated, the rule that the holder is entitled to rely upon the *litera scripta* being applicable in this case also (cf. *supra*, p. 340). For the obligant has bound himself ultimately to pay the contents of the bill, if the conditions required by his own law are fulfilled: we refer specially to the requirement of a protest or notification.<sup>18</sup> Many authors are, however, of a different opinion. The opinion which makes the law of the place of the action the rule,<sup>19</sup> unless it proceeds on the principle that the *lex fori* is always applicable, if that law does not itself command the application of some other,<sup>20</sup> does not require further discussion, and we need only note that, as the place

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<sup>18</sup> Story, § 360. Pardessus, Nos. 1485-1497. Massé, Nos. 141, 193. Schäffner, p. 122. Oppenheim, p. 405. Seuffert, Comm. i. p. 253. Beseler, iii. p. 369, note 16. Koch, Preussisches Privatr. ii. § 617, 3. Hoffmann Wechselordn. pp. 705, 606. Draft of the commercial code for Württemberg, Art. 1003. "The law of the place where the person, against whom a claim of recourse is to be made, entered upon the obligation, will regulate the right of recourse as regards its competency and extent." Judgment of the Supreme Court of Appeal at Lübeck, 24th October, 1821. (Jurisprudenz, p. 290-91). Judgment of the Court of Königsberg affirmed by the Supreme Court at Berlin on 3rd July, 1830. (Simon and Strampff, Rechtsprüche, 3, p. 29). Judgment of the Supreme Court at Zürich, 1st September, 1853. (Borchardt, p. 242, note 341). Judgment of the Supreme Court at Berlin, 9th May, 1857. (Striethorst, 24, p. 289. Borchardt, p. 242). "In the case of a bill drawn in this country upon some person abroad, if questions arise as to the right of recourse to which an indorsee in this country is entitled against the immediately prior obligant by reason of an indorsation made by the latter in this country, these must be settled by the law of this country, in so far as the necessity of a protest being taken against contingent obligants is concerned." Judgment of the Supreme Court at Berlin, 21st February, 1860. (Seuffert, 14, p. 283). This decides specially that the law of the place where the bill is drawn, and not where it is payable, will determine the obligation of the drawer in relation to the necessity of taking a protest in order to make good the right of recourse.

<sup>19</sup> Cf. for instance, Liebe on the D. W. O. with illustrations, p. 231. Judgment of the Supreme Court at Mainz of 5th February, 1829. (Archiv. für Rheinhessen, i. p. 341.

<sup>20</sup> Cf. *supra*, p. 63.

of action and the domicile of the obligant will, as a general rule, be the same, the result of that theory will generally coincide with the result of our own.<sup>21</sup> But if it is to be contended against us from another point of view, that in this matter all the parties to the bill have subjected themselves to the law of the place of payment, and that it is imperatively necessary, in judging of a right of recourse which affects several parties, that one and the same law should rule all the various claims of recourse, because any obligant who pays must have it in his power to recover from the obligant who is prior to him;<sup>22</sup> we must take exception to the former of these arguments by pleading that the importance of the solemnities required to found a right of recourse lies in reality in this, that the person against whom recourse is to be had need only pay, if he is provided with summary evidence and immediate intimation of the fact that the contents of the bill have been demanded in vain from the principal debtor;<sup>23</sup> and that, therefore, the solemnities in discussion here are of no importance with reference to the obligation against the drawee (or, as it may be in some bills, the maker), and can consequently have no connection with the law of his domicile.<sup>24</sup>

The weight of the second argument is lessened by the consideration, that the form, the place,<sup>25</sup> and the time appropriate for taking a protest are ruled by the law of the land where this protest is to be taken (and so, as a general rule, by the law of the place of payment).<sup>26</sup>

<sup>21</sup> Cf. Renaud. Wechselrecht, p. 72, note 5. Günther, p. 742-43. Heise's Handelsrecht (Frankfurt A. M. 1858), p. 222. Judgment of the Supreme Court at Kiel, 5th February, 1848 (Seuffert, 6, p. 161-62.)

<sup>22</sup> See the *rationes* of the judgments of the Supreme Court at Dresden (Seuffert, 2, p. 2 and 322).

<sup>23</sup> The Code de Commerce, Art. 170, for instance, provides that the right of recourse against the drawer shall only be lost by neglect to take a protest, if the drawer can show that, at the time at which it should have been taken, he was covered.

<sup>24</sup> A protest can only influence the liability of the acceptor upon clear proof of *mora*.

<sup>25</sup> By "place," of course we mean the particular locality, *i.e.*, the dwelling-house or place of business of the debtor.

<sup>26</sup> Story, § 360. Pardessus, No. 1497. Schäffner, p. 122. Draft of commercial code for Würtemberg, Art. 1003, p. 2. Judgment of the Supreme Court at Berlin, 12th April, 1845 (Decisions, 12, p. 374), and 9th May, 1857.

It follows from the fact that a protest upon a bill is a public instrument, and that this instrument obtains faith with the public by being executed by some official or notary under the rules of his own law exclusively, as the rule "*locus regit actum*" requires, that the form of the protest must be determined by the law of the place where it is taken.<sup>27</sup> As the protest shows that payment has been demanded at the proper place from the principal obligant,—that is, the acceptor, or in certain circumstances the maker, of a bill,—it follows that the law of the place where the protest must be made,<sup>28</sup> determines the particular locality where it is to be made. But that law by which parties intended that payment should be regulated is the only law that can determine whether application for payment was made to the principal debtor *opportuno loco*. Lastly, the period within which a protest must be taken is dependent upon the law recognised at the place where it is taken, because the principal debtor undertakes his obligation, and the other obligants intend that he shall undertake the obligation only in conformity with his own law, and the protest is meant to supply evidence that he has not fulfilled his obligation or has failed to undertake it.<sup>29</sup>

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(Seuffert, 12, p. 400), D. W. O. Art. 86. "As to the form of transactions for upholding or putting in force the rights created by a bill, which may be carried out abroad, the foreign law will decide."

<sup>27</sup> Cf. especially a judgment of the Supreme Court of Appeal at Lübeck, in 1833, reported by Thöl (*Entscheidungs Gründe*, p. 293). Judgment of the Court of Cassation at Paris of 18th Brumaire, an. 11 (1802) (Sirey, 3, i. p. 139).

<sup>28</sup> Cf. Hoffmann, *Wechselordn.* p. 610.

<sup>29</sup> The holder of the bill is in this way bound by the habits, usages, and laws of the place where it is to be protested; *e.g.*, he is bound by the holidays and the hours for closing places of business (cf. Hoffmann, *Wechselordn.* p. 608-9). This, however, is not, as Hoffmann seems to assume, the only reason for applying the law of the place where the operation is carried through, and we must not, therefore, concede that the 86th Article of the D. W. O. (see note 26 *ad fin.*) in using the expression "form" means only to denote these modifications, which prevent the holder of the bill from uncontrolled action at the place of the protest, and will allow the law, which rules at the place where those against whom recourse is to be taken are domiciled, to decide generally questions in relation to the other essentials for carrying out a protest. In our view, the admissibility of days of grace is to be determined by the law of the place of payment. It is undoubtedly true (Hoffmann, p. 610), that days of grace, which are of advantage to the drawee, impose a specially onerous condition upon the right of the bill-holder to make good his claim ;

The prior obligant against whom a claim of recourse is taken will, finally, be safe against that claim if he can show that the party claiming recourse has culpably failed to fulfil the conditions which foreign law may require to establish a further right of recourse against prior obligants abroad ; for the holder of the bill is bound to give up his right in the bill to the obligant against whom he claims, and if he has culpably put himself in such a position that he cannot discharge this duty, the person against whom the claim is made

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for, in order to keep up his claim, he must present it once on the day it falls due, and if payment is not made on that day, on the different days of grace ; but it is questionable, as Hoffmann himself recognises, whether the maker did not really give the drawee, indirectly it may be, a right to demand delay for a few days, if days of grace should be recognised at his domicile. The days of grace are so closely and substantially bound up with the liability of the principal debtor, that we must hold that all who are parties to the bill without qualification had the law by which that liability is regulated in their view ; and we must also reject the view which Hoffmann holds on principle to be the correct one (although not in harmony with the language of the D. W. O. which would rather that the law of the place where the obligation is undertaken were exclusively applied), that these days of grace must be recognised for the benefit of the drawee, both when they are required by the law of the place where the obligation is constituted and when they are recognised by that of the place where the bill is presented. And no counter argument can be drawn from the fact that the necessity of taking a protest (*e.g.*, against all the contingent obligants) must be determined by the law under which the obligation of the particular person, against whom recourse is to be had, was constituted, for this reason that there is no connection between the necessity of taking a protest and the obligation of the drawee, or of the maker in a bill drawn upon the drawer himself (*cf.* note 23). It is plain that our theory, whereby the law of the place where the protest was taken rules, best ensures the safety of trade. The precaution of taking a protest against all the contingent obligants, or of intimating to the obligant immediately preceding the protestor, can easily be taken ; but it cannot be expected that the bill-holder should know and observe the different days of grace appointed by all the systems of law, under the jurisdiction of which any of the obligations on the bill may have been undertaken. The periods of grace allowed in the case of bills payable at sight are not now in question. They are to be determined (*see too Hoffmann, loc. cit.*, pp. 605-9) by the law to which the liability of the various obligants is subject, according as recourse is had against them ; for they have nothing to do with the obligation of the drawee, who is by the law of bills equally responsible whether he accepts before or after the expiry of the period fixed for presentation by the law of the maker. The biennial period for presentation fixed by the D. W. O. will, therefore, always be of service to makers and indorsers of bills who are domiciled in Germany.

acquires thereby a peremptory right to refuse payment. We cannot deny that this rule may be productive of hardships ; these, however, would not so much be consequences of the diversity of the laws of different countries as of the excessive strictness which prevails in some countries as to bills, particularly with reference to the necessity of notice.<sup>30, 31</sup>

## § 86.

6th. Most writers<sup>1</sup> are of opinion that the limit of the interest payable on account of delay should be determined by the local law to which the liability of the individual debtor, against whom recourse is had, is subject, and therefore, as a general rule, by the law of the place from which that obligant's obligation is dated ; because the making of the bill and each transmission are separate transactions, and the obligants liable to recourse, although they undertake that payment shall be made at the place upon which the bill is drawn, do not bind themselves to pay it at any other place than that of their own domicile (that is to say, the place from which the bill or indorsation is dated).<sup>2</sup> Some English writers, however, propose in all cases to take the law of the place on which the bill is drawn as regulative.<sup>3</sup> The law that regulates each

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<sup>30</sup> The judgment of the Supreme Court of Appeal at Lübeck, of 31st Jan. 1858, reported by Borchardt, p. 242, is of no importance for the determination of the question, whether the necessity of taking a protest is to be determined by the law of the place of payment, or of the place where the defender undertook his obligation ; in that case the obligation was undertaken in England, and was payable there, and the defender did not, until a subsequent date, give up his trading establishment in London, and establish himself in Frankfurt (by the law of England a note of protest is, in the case of inland bills, equivalent to a formal protest).

<sup>31</sup> The view that the law of the domicile of the creditor in the bill rules, adopted by Boullenois, i. p. 370, because that is the only law he knows, has found very few adherents. A judgment of the Tribunal of Commerce at Hamburg of 19th May, 1859 (Borchardt, p. 242), recognises that the timeousness of the notification must be determined by the law of him who makes it.

<sup>1</sup> Pardessus, Nos. 1499-1500 ; Story, § 314 ; Burge, iii. p. 773 ; Hoffmann, p. 426.

<sup>2</sup> Story, § 315.

<sup>3</sup> Kent and Chitty. Cf. the citations in Story, § 315.



new indorsation will also determine the competency of accumulating the re-exchanges.<sup>4</sup>

7th, The law of prescription applicable is that which is recognised at the domicile of the individual obligant. This is a consequence of the principles already laid down as to the prescription of personal obligations. An exception is only recognised in so far as the bill holder is entitled to reckon upon a longer period for taking action, in virtue of his confidence in the *littera scripta* of the undertaking in the bill or indorsation.<sup>5</sup> Each indorsation constitutes a special contract by itself, the subject of which is, no doubt, dependent on the law of the place of payment, its validity, however, and its period of currency being independent of that law.<sup>6</sup>

In this case, too, the debtor on the bill may take the objection that the holder has through *culpa* lost, by the operation of prescription, the right of action against some obligant prior to the debtor against whom action is raised.<sup>7</sup>

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<sup>4</sup> Massé, p. 169 ; Story, § 314, note 6 ; Pardessus, No. 1500, believes that an indorser may be made liable for an accumulation of re-exchanges if a previous indorser or the drawer were in this position. See on the other hand Massé and Story, as cited.

<sup>5</sup> As a rule, therefore, the law of the place where the obligation is undertaken must be applied. Massé, p. 197 ; Pardessus, No. 1495 ; Renaud, Wechselsr. p. 22 ; Oppenheim, p. 705 ; Hoffmann, Wechselordnung, p. 605. Compare the judgments of the Supreme Court at Stuttgart, of 1st July, 1852 (Seuffert 8, p. 2) ; of the Supreme Court of Appeal at Lübeck, of 30th September, 1848 (Jurisprudenz, p. 176) ; of the Court of Cassation of the Rhine, at Berlin, of 8th October, 1838 (Volkmar, p. 249) ; and 6th March, 1843 (Seuffert, 2, p. 163) ; of the Faculty of Law at Göttingen, of 31st January, 1858 (Archiv. für. D.W.R. 6, p. 294) ; and of the Cour Royale of Paris, 29th March, 1836 (Sirey, 36, 2, p. 457). The law of the domicile of the obligant was the rule laid down by the Supreme Court of Austria in a judgment of 9th June, 1858 (Goldschmidt Zeitschrift für das gesammte Handelsr. 2nd year, Part I. p. 135). When the domicile is changed after the obligation on a bill has been undertaken, the *littera scripta* of the bill will usually obviate any difficulty. See Pardessus. See, too, the judgment of the Supreme Court of Appeal at Lübeck, 26th February, 1861 (Seuffert, 14, p. 169), against the view that the law of the place of action should rule.

<sup>6</sup> [In the case of a bill payable to order, the law of the place where it was drawn will regulate the period of prescription. This was decided by the Supreme Court of Moscow, 17th March, 1877 ; but, as we have seen above, this is not inconsistent with the doctrine of the author ; cf. note 1 to § 85.]

<sup>7</sup> Cf. Draft of a Code of Commerce for Würtemberg, art. 1004 : " If an indorser against whom a claim is made could show that the conditions which

8th, When a bill has been lost, any declarator of discharge or cancellation must, in accordance with general principles, be obtained against each one of the obligants on the bill, in accordance with the law which determines his special liability, and before the court to which he is subject, which will generally be the *judex domicilii*. Since, however, all obligants will be discharged if the acceptor is free, any decree of this nature which is obtained in conformity with the law of the acceptor's domicile<sup>8</sup> will enure to all the other obligants.<sup>9</sup> The same rule holds good with reference to decrees of this nature in the case of a bill drawn upon the party himself. If such a decree is in accordance with the law of the domicile of the maker, all are free.

9th, The competency of a special form of action upon bills, and of special diligence and execution is immediately dependent on the law under which the obligation to make good the bill on which action is taken was constituted, and next upon the law of the place of action or of execution, as the case may be—upon the former because the bill debtor by his contract has necessarily subjected himself to the compulsitor which belongs to such an obligation ;<sup>10</sup> upon the latter because the forms of process and of execution must be regulated by the *lex fori*.<sup>11</sup>

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were necessary to enable him by foreign law to have recourse against a prior obligant have not been fulfilled, he is protected against the claim." Pardessus, No. 1499, and Pöhl, Commercial Law, p. 656, are of a different opinion.

<sup>8</sup> And in certain circumstances the law of the place where the acceptance took place.

<sup>9</sup> The validity of the obligation of the indorser, as of the drawer, does not depend upon the validity of the acceptance. But it is quite true that if the acceptor is free, all other obligants, if the bill has once been validly accepted, are thereby discharged, for the only obligation they have undertaken is that he shall accept and shall pay according to his own law. If, then, in a question with the real bill holder, the acceptor is discharged as if he had paid, these other parties must be free also.

<sup>10</sup> Heise, Handelsr. p. 140 ; Renaud, Wechselsr., as cited in note 20 *supra*.

<sup>11</sup> A judgment of the Supreme Court at Berlin, of 11th May, 1858 (Striethorst, N.F., 2nd year, Vol. I. p. 91), says : " Articles 84-6 of the D.W.O. do not intend to regulate the extent of the material consequences resulting from indorsation by foreign law, but merely the formalities of the bill. The debtor must therefore submit to the ordinary laws of process as to bills which obtain at the place where the Court is situated." Another judgment of the Supreme

10th. As regards the proof of foreign law, we may refer to the principles already laid down (§ 32), with which the practice of the Supreme Court of Germany seems hitherto to have corresponded, with this caution, that if an instant verification of facts is required, the same despatch must be required when the fact for inquiry is foreign law unknown to the judge, on pain of having the action thrown out and the plea repelled.<sup>12</sup>

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Court at Berlin, 10th July, 1860 (Seuffert, 14, pp. 282, 283), says: "The special provision of the 2nd article of the D.W.O.—viz., that the debtor in a bill must answer for the fulfilment of his obligations with his person and his property—belongs, as the place of this article in the D.W.O. shows, to the nature of the transaction and to the real law of bills, and not merely to the rules of process. Any one indorsing a bill in our territory, or drawing one, if he does not belong to the excepted classes, makes himself liable by this declaration of his will to the diligence appropriate to bills. But if one does this in a country where it has no such effect, he cannot be touched by legal consequences which are only attached to the act by a law that has no application to him. It does not follow that diligence appropriate to bills is competent because summary procedure is. . . . The question, to what extent the defender—putting out of view the peculiar diligence appropriate to this legal category—can be rendered liable to ordinary diligence for debt, has nothing to do with the law of bills, and cannot, therefore, in this case be decided by American law, but is rather dependent upon the law which deals with execution generally.

<sup>12</sup> The judgments of the Supreme Court of Appeal at Dresden, in 1848, (Borchardt, p. 241), and of the Supreme Court of Appeal at Lübeck, on 31st May, 1858 (Archiv. für D. Wechselrecht, 7, p. 374), affirm that the judge, if he should know the foreign law, may apply it without requiring proof of it, and, by applying it in such circumstances, will the better act up to his duty as a judge by avoiding unnecessary delays of process, and giving speedy despatch to matters of trade and exchange which require it. The Supreme Court at Rostock has not required proof of foreign law where the document founded upon complies with the provisions of the D.W.O. (1853, Borchardt, p. 239; cf., too, Hoffmann, pp. 597, 598). The tribunal at Darmstadt has, on the other hand, rightly required a summary proof where in the document the word "exchange" was wanting (Archiv. für Praktische, Rechtswissenschaft von Schäffner, 1852, part 2, p. 64). In my opinion, it is at variance with the principles of action upon bills to hold, with Hoffmann, that in such cases a counter-proof of the foreign law will be allowed. The document must appear to be a bill, otherwise the defender cannot be called upon to answer in the form of action appropriate to bills, or to allow any preliminary inquiry in the ordinary form. In reference to protests, see § 32, notes 3 and 11.

*Note K, on §§ 84-86.*

[The law of England on this subject is stated by Mr. Westlake, at p. 243 *et seq.* According to that law (1) the extent of the obligation incurred by the acceptance or making of a bill is determined by the law of the place where it is payable, and the liability of any indorser as a surety for payment is indirectly affected by that law; (2) parties who contract to pay in consequence of an indorsement made by a third party will refer the validity of their obligation to the law of the place where the indorsement takes place; (3) the necessity or sufficiency of a demand or protest is determined by the law of the place of payment; (4) in case of failure to pay, the holder is entitled to interest, and to the amount of the bill, in accordance with the law of the place where it was payable.

It will be observed that the *lex loci contractus* is not applied in English law to the same extent or effect as in the text, the *lex loci solutionis* taking its place except so far as regards the validity of an indorsement to transfer the obligation contained in the bill; as regards the import or extent of the obligation itself, it is not recognised as regulative. The drawer and indorsers are regarded as sureties for the payment of the debt contained in the bill according to the conditions and at the time fixed by the law of the place of payment; and hence, although they have drawn and indorsed a bill with a certain limited currency, if, by the law of the place where that bill falls to be paid, an extension of its currency is allowed, as happened in France during her war with Germany, this extension will affect their liability, so that it will be correspondingly prolonged. *Rouquette v. Overmann*, 1875, L. R., 10 Q. B., 525.

The law of Scotland holds that the place of payment will determine the law that is to regulate the bill, and that, for example, a foreigner drawing upon a Scot, the bill to be payable in Scotland, has entered upon a contract the validity and import of which must be determined by the law of the place of payment—viz., Scotland, and that although no acceptance was ever given in Scotland. In the same way, if the question concerns the validity of an indorsation, the law of the place of payment is appealed to; nor is it merely the

validity of the contract constituted by drawing or indorsation that is so regulated, but all that relates to the nature and essence of the contract contained in the bill or indorsations thereof. Questions of compensation, prescription, or the like, being extrinsic to the contract contained in the bill, may subsist to different effects between the holder and the drawer, acceptor, or each indorser, according to the provision of the *lex fori* of him against whom the holder takes recourse; but the law of Scotland views the drawing, acceptance, and indorsation, all as dealing with one and the same contract—viz., the assignation of the fund lying in the hands of the drawee at the place of payment, and all therefore as regulated by the law of the place of payment, thus running counter to the doctrine of the text, and adopting that of Story, § 317. See, on the law of Scotland, *Robertson v. Burdekin*, 14th Nov. 1843, 6 D. 17; and *Stewart v. Gelot*, 19th July, 1871, 9 M., 1057.

In direct contradiction to these cases, the court at Leipsic (*Botta v. Ehrts*, 4th December, 1876), proceeding on the principle of the text that the *lex loci actus* will regulate the liability of each separate indorser, has held that the obligation undertaken by an indorser, to guarantee payment at the expiration of the period of currency, cannot be affected by any extension of that period that may be subsequently introduced in conformity with the law prevailing at the place of payment. A similar decision, giving effect to the law of the place of indorsation, was pronounced by the court at Bordeaux (*Newton v. Marcillac*, 24th January, 1880), in the case of a charter-party transferred by indorsement in Russia: by Russian law such a transaction does not transfer property, but merely gives a right to claim delivery; and, therefore, although by the law of France, which was the *forum* and the place of payment, the indorsee would have had a higher right—viz., an independent right of property, it was held that he had only the rights of a Russian indorsee, and was, therefore, liable to all objections competent against the indorser. That the endorsement depends for its validity on the *lex loci actus*—e.g., that a blank endorsement, or an undated endorsement, or an endorsement that does not bear to be “for value received,” is good if the law of the place where it was made does not demand these conditions, and must be recognised even in a

country where they are required, the place of payment being in the latter country—has been decided by the Tribunal Civil de Marseilles (*Dornestini v. Icaramanga & Cie.*, 5th December, 1876); the Court of Paris (29th March, 1836; *Sirey*, 1836, Q. 457); and the Court of Bordeaux (*Morgan v. Lefargue*, 7th June, 1880). The *Deutsche Wechselordnung*, § 56, and the Code of Commerce of Switzerland, § 437, expressly make this provision. In so far as mere forms are concerned, the law of Scotland and of England will require and recognise observance of the law of the place where the bill or an endorsement is made; otherwise the intention of parties to bind themselves is not evident. It is as to the validity and effect of such transactions that they hold the place of payment to be regulative.

It may be noted that blank endorsement is recognised in England, the United States, Belgium, Germany, Portugal, Hungary, Russia, Denmark, and Austria.

The English doctrine as to the law that regulates protests receives support from decisions in France and in Russia, which reject the doctrine of the text; the Court of Paris (*Brocheton v. Aron et Cie*, 22nd Nov. 1875) has held that the validity of a protest must be determined by the *lex solutionis*; and the Commercial Tribunal of St. Petersburg (*Gibbs v. Sewastianoff*, 27th January, 1875), laid down that a bill must be protested within the time and according to the forms prescribed by the law of the place of payment.

A case decided by the Supreme Court of the Empire (*Reichsgericht*) at Leipsic, 24th Sept. 1875, illustrates the general doctrine of the law of obligations, that the extent of the debtor's liability is to be measured by the law of his domicile, and the special application of it to the law of bills whereby, as stated in the text, the conditions of recourse are regulated by the law that determines the liability of that obligant in the bill against whom recourse is sought. The ordinary case of the application of this rule—viz., the case of indorsers or the drawer, has already been dealt with: in the present case, however, a bill was drawn and accepted in due course by the drawee; a subsequent indorsee having come against the drawee for the contents of the bill, was met by the defence that he had no funds of the drawer in his hands; it turned out that he had, after the date of the presentment, paid funds

at that time in his hands belonging to the drawer to him. By the law of the drawee's domicile the presentment did not operate any assignation of these funds so as to interpel payment of them, and the court held that the measure of his liability must be determined by his law as the obligant, and that no recourse could be had against him, he having paid away the funds drawn upon under the cover of his own law.

The French courts will not entertain action for the contents of a bill accepted by a foreigner and payable to a foreigner in a foreign country (*Laurie v. Lacy O'Brien*, C. de Paris, 2nd January, 1875); nor does the fact that the bill was drawn in Paris confer jurisdiction upon them, if it is payable abroad in foreign money, and the dispute arises between two foreigners; they will not exercise jurisdiction although the transaction of trade, which gave the bill its origin, took place in Paris, and there is an assignation of all rights in and to the bill to a French subject (*Ottet v. Vereken*, C. de Paris, 28th July, 1879.) The unwillingness of French courts to permit foreigners to conduct suits before them is noticed at length, *infra*, § 118, note.

In America the interest due, and all that concerns the days of grace, demand and protest, are determined, as in England, by the law of the place of payment: but the engagement of each indorser is determined by the law of the separate contract which he has made. Wharton, §§ 449, 452-54.]

C. OBLIGATIONS *Quasi ex contractu* and *Quasi ex delicto*.

§ 87.

Obligations of this class are, by the unanimous voice of almost all authors, made subject to the law of the place where the act was done or the circumstances took place from which the obligation arose.<sup>1</sup> Obligations specially affecting the owners of land, such as those which refer to the *actio aquæ pluriæ arcendæ* or *finium regundo-*

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<sup>1</sup> *Burgundus*, v. 1; *Christianæus*, *Decis.* vol. i. *decis.* 283, No. 14; *Alderan Mascardus*, *Concl.* 7, No. 15; *Seuffert Comm.* i. p. 256; *Renaud Privatr.* i. § 42, note 28; *Schäffner*, pp. 123-4; *Massé*, p. 139, 224; *Burge*, iii. p. 1003; *Fœlix*, i. p. 259. *Mühlenbruch*, *Pandects*, i. § 73, proposes that obligations *ex lege* should be determined by the law of the domicile of the person under obligation. As to assignation, transmission to heirs, and discharge of the obligations dealt with in this paragraph, see *infra*, § 88, note 3.

*rum* of Roman law, are in accordance with this rule to be determined by the *lex rei sitæ*. Special instances of the obligations now in question are the liability created by receiving<sup>2</sup> or dealing with other persons' property (*condictio indebiti*, or carrying on a business without a mandate to do so) liability for the delicts of others, or damage done by animals,<sup>3</sup> and analogous cases. The principles on which these depend have been already laid down (§ 66), and in accordance with them an exception must be recognised for the case of some one incurring an obligation by reason of an act or deed connected with a thing belonging to himself,—*e.g.*, by reason of the damage caused by an animal belonging to him,—where this thing or animal was in the territory where the damage was done without the privity or help of its owner: in such a case there is no principle which will justify the application of the law of the place where the damage was done to determine the liability of the person.<sup>4</sup> There is in such a case no further obligation upon the owner than is provided by the law of the place in which the animal or piece of property last was with its owner's will, while at the same time he cannot incur any further obligation than the law of the place where the act was done ordains. But if the property of the thing that did the damage passes by the law of the place where it was done to the person who suffered, or to a public officer, then by the application of the rule of the *lex rei sitæ* the general rule would be observed.<sup>5</sup>

The obligation of guardians is also referred to a *quasi* contract, and rightly, in so far as the guardian can be com-

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<sup>2</sup> Seuffert as cited: "In claims of repetition the law of the place where the original transaction took place rules, but where the question is whether the payment was *indebitum* or without legal ground, regard will always be had to the law which regulates the relation produced by the payment. Cf., too, Fœlix as cited.

<sup>3</sup> The law of the place where the damage was done, and not that of the domicile of the defender, rules in cases of "*actio de pauperie*," according to judgment of the Supreme Court at Berlin on 5th August, 1843 (9th Dec. p. 381). It is to be observed that in that case the action was instituted at the domicile of the defender, and the law of the place where the damage was done was unfavourable to the defender. Koch, on the 34th paragraph of the Introduction to the Prussian A. L. R. and Bornemann, i. p. 66, profess to agree with this.

<sup>4</sup> Cf. Criminal Law, *infra*, §§ 137 and 141.

<sup>5</sup> Cf. § 64, note 8.



pelled to undertake the office. If the office is voluntarily undertaken, this seems rather to be a real contract, partly belonging to public policy, in which the guardian, inasmuch as the question is one of *jus publicum*, cannot make conditions, but is rather forced to come under the operation of the statutory rules of guardianship which prevail at the seat of the official establishment which superintends his administration.<sup>6</sup>

The obligation to undertake the office is, however, ruled by the *lex domicilii* of the person selected for the office.<sup>7</sup> No one can be obliged to undertake a guardianship abroad from which the law of his own country, if the office were open there, would absolve him.<sup>8</sup> But if any one voluntarily undertakes such a charge, then, in accordance with what we have said, he is unconditionally subject to the law recognised at the seat of the court which superintends all curatories, and must, therefore, give the caution which it requires, although the law of his own domicile might not require that of him in similar circumstances.<sup>9</sup>

It is often said by French writers, and assumed in the practice of the French courts, that a foreigner cannot be appointed guardian to a French subject, because the rights and position of a guardian belong to the class of *droits civils*, and, as has also been said, constitute in a measure an office of State (*dignité*).<sup>10</sup> Unless the law specially provides that foreigners shall be excluded from this office, they are not to be excluded, according to our view (cf. what has been said above, § 27, as to the equality of foreigners and natives in the eye of the law), since it is not consistent with our

<sup>6</sup> The same is true of the duty of a public officer (Günther, p. 742). The law of the State in whose service the person concerned is must rule.

<sup>7</sup> Savigny, § 380; Guthrie, p. 303.

<sup>8</sup> In my view, no one is bound to undertake foreign guardianships, to which the law attaches obligations inordinately in excess of those imposed by his own law. We are not concerned with such slight divergencies in the regulations of the office as may be easily found prevailing in different provinces of the same State.

<sup>9</sup> Boubier, chap. xxvi., No. 206; chap. xxviii., No. 83; Schäffner, p. 124; Fœlix, i. p. 260. Unger as cited above.

<sup>10</sup> Cf. Mailhers de Chassat, No. 230; Gand, No. 498, and the judgments there referred to.

views of law to hold guardianship to be in substance an office of State connected with political rights. It is, however, true that, on grounds of expediency, the appointment of foreigners to such offices should not be made.<sup>11</sup>

#### D. OBLIGATIONS ARISING FROM ILLICIT ACTS.

### § 88.

We have already tried to show that obligations *ex delictis*, in so far as their object is to make good the loss sustained,<sup>1</sup> are subject to the law of the place where the act took place.<sup>2, 3</sup> We propose, therefore, now to do no more than test the opposite opinion, held by many authorities, by which a coercitive character is ascribed to the laws that deal with such obligations, and the law of the place of action taken as the exclusive rule.<sup>4</sup> The considerations urged upon this point by Wächter—viz., that the judge, in an action upon such an obligation, can give the pursuer no other redress than the law to which he (the judge) is subject, declares to be just—would exclude altogether the application of foreign law, and lead to the exclusive application of the *lex fori*, unless it were allowable for parties expressly to subject them-

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<sup>11</sup> We must understand the 192nd paragraph of the Austrian Code in this sense. Cf. Unger, p. 304. [In Scotland, the Court will not appoint a person out of their jurisdiction to be factor. Thoms, § 42, p. 43.]

<sup>1</sup> See *supra*, § 66, pp. 272-73, as to the treatment of such obligations intended to impose punishment.

<sup>2</sup> The majority of authors take this view—no doubt without expressing any precise view as to the case of a claim upon a delict intended as a penalty. So Burgundus, v. 2; Seuffert, Comm. i. p. 253; Reyscher, i. § 82; Phillips, i. § 24, p. 192; Kori, iii. p. 13; Renaud, Privatr. i. § 42, note 28; Mittermaier, § 30, p. 116; Eichhorn, § 36; Schäffner, p. 124. So, too, an act of the Supreme Court of Appeal at Munich, 5th June, 1855 (Seuffert, 9, p. 325). See, too, the grounds of judgment of the Supreme Court at Berlin, cited in note 3 to the preceding paragraph.

<sup>3</sup> We need not here show in detail that the assignation and discharge of claims by reason of illicit acts in bankruptcy, or by prescription and the transmission of obligations *ex delictis* to heirs, are ruled by the principles already examined. (See §§ 76, 78, 80.)

<sup>4</sup> Wächter, ii. p. 289; Savigny, § 374; Guthrie, p. 253. Judgment of the Supreme Court of Appeal at Darmstadt, 30th September, 1853 (Seuffert, 9, pp. 1-2); and of the Supreme Court at Stuttgart on 25th January, 1856 (Seuffert, 11, p. 2).

selves to foreign law ; for it would have to be applied in cases where a thing had been possessed in accordance with our law for ten years, in which time our law declares that the owner shall lose his right, while it might be that the *lex rei sitæ* held that that result does not ensue until a longer period has elapsed. As a matter of fact, in asking that the *lex fori* should be applied, what is really asked is that in foreign countries every person should be obliged to observe all the provisions of the law<sup>5</sup> which are recognised at the seat of the court, while at the same time the pursuer, in actions for a penalty, has an important power given to him which is in such actions specially dangerous.<sup>6</sup> In this connection, reference may be made to the reasons urged above, § 27, against the application of the *lex fori* to questions of material private law.

On the other hand, the judge must decide, in the light of the law of his own country, the question whether the claim so made is to be held as a claim of damages or as a penal action ; and should he hold it to be the latter, he can only entertain the claim in so far as his own law will allow.<sup>7</sup> The place of the delict must not, however, be held to be the place where the act had its operation, but the place where it was actually itself done.<sup>8</sup> We shall recur to this point in the treatment of criminal law. We need only observe here that, if the act is not forbidden at the place where its operation was

<sup>5</sup> See, on the other hand, Heffter, p. 71. Wächter, p. 395, makes an exception for the case where the foreign State, in whose territory a subject is injured, declares the act to be such as does not ground a claim for recompense and satisfaction.

<sup>6</sup> Savigny, too, recognises this danger (§ 374 ; Guthrie, p. 256), but holds that it is very much diminished by the restrictions to which the jurisdiction is always subject. See, however, the provisions of Art. 14 of the Code Civil, or consider the possibility of bringing a counter-action or obtaining compensation.

<sup>7</sup> For instance, the courts of Hanover must always throw out an *actio æstimatoria* for injuries, in conformity with § 391 of the Hannov. Processdngung, even although the pursuer should have a claim for a sum of money by the law of the place where the act was done. Cases of this kind have occasioned the view which we have assailed in the text. On the other hand, however, the judge cannot give decree for more than the law of the place of the act allows.

<sup>8</sup> Judgment of the Supreme Court of Appeal at Munich, 16th March, 1847 (Seuffert, 3, p. 325). Hommel, Rhaps. Quæst., vol. ii. obs. 409, note 17, is of a different opinion.

felt, then no action for a penalty can be brought, even in the courts of the country where the act was done.<sup>9</sup>

The obligation of one who has been compelled to pay alimony<sup>10</sup> to the mother of an illegitimate child cannot be called an obligation *ex delicto*; whereas, on the other hand, the obligation to make payment to one who has been seduced, by way of compensation for the loss of a respectable marriage, has the character of an obligation *ex delicto*.<sup>11</sup>

The reproduction of literary and artistic works belongs to the category of illicit acts. If we remember the historical origin of literary and artistic property, which was originally a privilege specially conferred in each case upon the individual,<sup>12</sup> and then *ipso jure* was given to every native author or publisher,<sup>13</sup> and if we also remember that *in dubio* the judge in an action upon delict must give decree in favour of the defender, we shall be able to explain the practice,<sup>14</sup> which is almost universal, whereby in default of any express provision, including works that have appeared abroad, the protection of the law is confined to the property in works that have

<sup>9</sup> Judgment of the Supreme Court at Berlin, 25th June, 1858 (Striethorst, 30, p. 130). A defamatory letter was sent by a Prussian to a person domiciled in England, and was delivered there. Proof was required that the act was penal by the law of England. Cf. *infra*, § 141.

<sup>10</sup> Cf. on that point the law of the family, § 105.

<sup>11</sup> Cf. Wächter, ii. p. 396, and *infra*, § 105. It is obvious that an action must be thrown out if the law of the court before which it comes holds it to be indecent or immoral. This is no peculiarity of actions on delict (cf. *supra*, § 33), although it occurs most frequently with them.

<sup>12</sup> Cf. on this point Warnkönig in Pöhl's Kritischer Vierteljahrschrift für Gesetz und Rechtsw. 1859, p. 47, and Bluntschli in his Staatswörterbuch, i. p. 615.

<sup>13</sup> That does not exclude the possibility of demanding this privilege from the legal conscience and sense of right, just like property in things; but it will always remain, from the nature of things, an impossible task to place property in things on an equality with property in intellectual products.

<sup>14</sup> See Foelix, vol. ii. p. 320, and authors quoted there in note 1, Püttlingen, § 101. [See too the decision of the Reichsgericht at Leipsic, 12th June, 1880. No protection is accorded to literary, musical, or artistic works published abroad, and a foreigner can only obtain protection if his work is published for the first time in Germany. In France, on the other hand, by the decree of 28th March, 1852, a foreigner is able to obtain for a work, even if it is published abroad, the same protection as a native author for a work published in France, by observing certain prescribed formalities.]

appeared in its own country. There is not in this any revolt against the general principle of the equality of foreigners and natives before the law;<sup>15</sup> that charge could only be made if protection were denied to works written abroad and published in this country.

In more modern times several treaties for the protection of literary property have been concluded.<sup>16</sup>

This is not the place to discuss the claims which the legislature and the makers of treaties should in this subject take into consideration. It may merely be noted that it is in accordance with the true principles of private law that all copyright should be protected by the law of every country, and that nothing more should be required in order to confer such a copyright than the fulfilment of the conditions imposed upon publication by the law of the country, and that no regard should be had to the circumstance whether the author or publisher is domiciled in this or any other country, or whether the foreign author enjoys a less complete protection in his own country. More recent treaties have taken those considerations into account; they are, however,—and this should not be forgotten,—considerations for the legislature.<sup>17</sup>

Patents are valid only in the country in which they are given, but may be extended to foreigners.

The protection against counterfeits enjoyed by industrial products has in law no other foundation than a privilege specially granted to all manufacturers; and as on the one hand the foreign manufacturer has, in the absence of a special statutory provision or a treaty to that effect, no protection against counterfeits produced in this country,<sup>18</sup> so, on the

<sup>15</sup> The author of an essay in the *Deutsche Viertel Jahrsschrift* (1859), on the protection of literary property, lays this down as a principle.

<sup>16</sup> See, too, the corresponding resolutions of the German Bund.

<sup>17</sup> See the appendix by Warnkönig in Pöhl's *Vierteljahrsschrift* and Bluntschli, as cited p. 618, as to the different treaties. See, too, the resolutions of the Congress which met in Brussels in 1858 to consider the questions as to the international protection of literary and artistic property. [Cf. *supra*, note 14.]

<sup>18</sup> So, too, the constant practice of the Court of Cassation at Paris (Fœlix, ii. pp. 324-25). Fœlix complains of it on grounds of expediency. The Police Code of Hanover gives foreign manufacturers protection on condition of reciprocity insured by treaty, §§ 225, 250.

other hand, since the legality of producing counterfeits must be determined by the law of the place where the act is done—*i.e.*, where the goods are made—the native manufacturer, in like manner, has no good claim on account of counterfeits produced abroad.<sup>19</sup> If the sale of such counterfeit goods were forbidden, then, of course, the native manufacturer would be able to prosecute any person selling them in this country.

## V.—LAW OF THE FAMILY.

### INTRODUCTION.

#### § 89.

The law on this subject is in general, as we have already shown, ruled by the *lex domicilii* of the persons concerned. We need not, therefore, do more in this place than deduce the consequences of this general rule, and see what modifications of it are required by the interference of rules of law upon other subjects with the sphere of the law of the family.

#### A. MARRIAGE.

##### 1. PERSONAL CAPACITY. IMPEDIMENTS TO MARRIAGE.

#### § 90.

It is generally recognised that the marriage is subject to the law of the domicile of the married persons—*i.e.*, of the husband, for the wife's domicile is dependent on that of her husband.<sup>1</sup> Marriage rests upon a contract, but a contract very different from ordinary obligatory contracts,<sup>2</sup> and even although the difference in the nature of the contracts was not enough to justify our rule, we could establish it on the ground that the marriage is to be carried out and to subsist at the husband's domicile.

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<sup>19</sup> Judgment of the Cour de Paris of 29th Nov. 1850, cited by Demangeat, note to Fœlix, p. 325. [The law of trade-marks is the same.]

<sup>1</sup> By the laws of all civilised peoples the husband is the head of the family, Savigny, § 379 ; Guthrie, p. 291.

<sup>2</sup> Savigny as cited ; Story, § 109. [For the doctrine of "matrimonial domicile," see *infra*, p. 379.]

*First*, The application of this principle to the conditions under which marriage may be contracted, or from a negative point of view, to the restraints upon marriage, presents no difficulty if the spouses have the same domicile :<sup>3</sup> in particular the place of celebration does not rule in such circumstances, although, on the one hand, a restraint on marriage which does not forbid, but merely impedes it, will, from its very nature, be defeated if the marriage is celebrated in a foreign country ; and, on the other hand, the officials and clergy of any country cannot be forced to assist in celebrating a marriage which, by the law of that land is held to be inadmissible and incapable of being licensed by a dispensation.<sup>4</sup> The former circumstance, combined with the principle which, as we shall see, is to regulate the form of the celebration—viz., “*locus regit actum*,” appears to have given rise to

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<sup>3</sup> Henr. de Cocceji, *De fund.* vii. 22 ; Cochin *Œuvres*, ii. p. 154 ; Seger, pp. 8-9 ; Walter, § 46 ; Holzschuher, i. p. 82 ; Boullenois, i. pp. 495-6 ; Wächter, ii. p. 185 ; Püttlingen, § 56 ; Thöl, § 80 ; Mittermaier, i. § 30, p. 116 ; Wheaton, § 92, p. 122. As to the recognition of this principle in legislation, see Fœlix, ii. p. 483. See, too, the judgment of the Supreme Court at Berlin, reported in the *Decisions*, 29, p. 380, 15th January, 1855 (especially p. 396). Story, § 95, lays down that a prohibition upon the marriage of subjects with foreigners or persons of a different religious belief, need not be recognised in any other country where such a restriction does not exist. This is, however, only true if we are asked to apply the prohibition to the marriage of a native woman with a foreigner, either because he is a foreigner or is a heretic ; for it is in that case alone that the prohibition comes into collision with the right of emigration, which international law must recognise. In the opposite case the woman claims to be naturalised, and then the State may impose whatever conditions it thinks fit. Schöffner propounds a peculiar theory, p. 129 :—“ If in this country a marriage between particular persons is prohibited, then this country will not recognise a marriage between these persons although it may have been celebrated abroad in some country where it was allowable. On the other hand, the country in which it was concluded must certainly recognise it. What of a third country ? We think that it will be recognised there also, although the law of that country may also forbid it ; this is so, either because the prohibition applies exclusively to the citizens of that country, or because the forbidden marriage was not contracted *in territorio*.” This theory is refuted by the principles which we have laid down in the text. But it may also be well to remember how inconvenient it would be for the interests of whole families if a marriage were to be declared null in one country and valid in another. Cf. Story, § 81 ; Savigny, § 379 ; Guthrie, p. 291 ; Gand, p. 373 ; Fœlix, ii. pp. 376-82.

<sup>4</sup> Gand, No. 377.

the rule which some writers and the courts of England and America have adopted, that the validity of a marriage, even as regards prohibitions and the personal capacity of the spouses, must be determined by the law of the place where the marriage is celebrated,<sup>5</sup> exceptions being admitted only in the case of polygamy, or an *incestus juris gentium*.<sup>6</sup> According to our view a marriage contracted in a foreign country for the purpose of evading legal prohibitions that exist at the domicile of the parties will be held to be null;<sup>7</sup> it will also be necessary for the validity of the marriage that the parties should at least have acquired a domicile at the place of celebration *in bona fide*;<sup>8</sup> and, finally, it must be admitted that the transgression of a prohibition upon marriage which prevails at the place of celebration will not make the marriage void, if there is no such prohibition by the *lex domicilii*.<sup>9</sup>

It follows at the same time from the application of the *lex domicilii*, that any dispensation from a restraint on marriage must be obtained at the domicile of the intending spouses, and not from the officials or the sovereign of the country where the marriage is celebrated.<sup>10</sup>

Some authorities, instead of making the law of the domicile of the husband the exclusive rule,<sup>11</sup> as most do,<sup>12</sup> hold that where the parties concerned have not the same domicile, the particular law of the domicile of each of the spouses must rule his or her case. We cannot meet this contention with the argument that the husband is the head of the family, and that, therefore, his law must rule, since in such cases we are dealing with circumstances antecedent to the existence of that

<sup>5</sup> Huber, §§ 12, 13; Story, § 89 and § 113; Burge, i. pp. 15, 186; Cf. Pütter, Rechtsfälle, iii. pt. i. p. 81. [But see *infra*, p. 371, as to English law.]

<sup>6</sup> See, however, the difficulty of determining what is *incestus juris gentium*, Grotius. de J. B., ii. c. 5, § 12.

<sup>7</sup> Hüber, § 8; Bouhier, ch. 24, No. 12, 50.

<sup>8</sup> Burge, i. pp. 190-4-5; Cf. Story, § 116a.

<sup>9</sup> Story, § 79.

<sup>10</sup> Demangeat on Foelix, ii. p. 375-76.

<sup>11</sup> Wheaton as cited; Wächter, ii. p. 186; Harum in Haimel's Magazine, vii. p. 397; Gand, No. 378.

<sup>12</sup> Savigny, § 379; Guthrie, p. 291; Holzschuher, i. p. 81.



headship.<sup>13</sup> But in spite of the general accuracy of the rule, which we have adopted, we may allow the following modification to be made. If the marriage is prohibited by the law of the wife's domicile, but not by that of the husband, the wife acquires a new domicile, not by the celebration of the marriage, but from the fact that she follows her husband to his domicile.<sup>14</sup> If a new domicile is acquired, its law must rule; and we can only recognise an exception in the case where the woman is incapable of changing her domicile without the consent of some third party,<sup>15</sup> such as a guardian or curator.<sup>16</sup>

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<sup>13</sup> Harum as cited. [In the case of Musurus Bey and Comtesse d'Imécourt, 28th May, 1880, the Court of Paris, who was asked to determine the validity of the marriage of a French minor lady with a foreigner, held that it was a *petitio principii* to urge, that as her personal law had been altered by the marriage, French law could not apply; and subsequently annulled the marriage, which had been celebrated in England, on the ground of clandestinity, 24th Feb. 1882.]

<sup>14</sup> If the marriage is not in conflict with the law of the husband's domicile, the wife has a right to require one there.

<sup>15</sup> Cf. *supra*, pp. 103-04.

<sup>16</sup> The distinction taken by Unger, p. 190, note *a*, is not quite to the purpose: "In so far as the question is one merely as to the age required for marriage, or as to the necessity of obtaining the consent of third parties to enter upon the marriage, then certainly each side will be regulated by the law of its domicile; but where the question is one as to the position which one side holds towards the other—*e.g.*, as to the capacity of a Christian to marry a Jewess, or a Jew a Christian, a cousin to marry a cousin, or an aunt a nephew—then both sides will refer the question absolutely to the domicile of the husband." The provision which has been introduced in many countries (see Püttlingen, § 57), by which foreigners are required to produce a certificate from their government that the proposed marriage is permissible by the law of their country, has failed as a practical regulation, since there is often no officer at the place of domicile who can give such a certificate. In the absence of special treaties, it seems safer only to require proof where a marriage is contracted in this country between a foreigner and a woman of this country, that the wife will be received as such in her husband's domicile, and to leave to the parties concerned to make all further inquiries as to the existence of other impediments to the marriage, unless from the representations of parties themselves it is known, or is matter of everyday knowledge, that there is some impediment which the law of this country cannot get over (cf. Fœlix, ii. pp. 384-86).

## 2. FORM OF CELEBRATION.

## § 91.

*Secondly*, Since the marriage itself is subject to the law of the husband's domicile at the time of the celebration of the marriage, the form of celebration must depend on this law also. But the rule "*locus regit actum*" has for long been applied here,<sup>1</sup> except where there is some special statutory provision to the contrary, such as there may very well be ; and this rule has been ranked in English and American practice as a principle, although they do not seem to refuse recognition to a marriage celebrated according to the forms of the domicile, in so far as the spouses belonged to the same country before their marriage.<sup>2</sup>

Most systems of law which have any express declaration on this subject recognise the rule "*locus regit actum*," in

<sup>1</sup> Hist. iv. 10 ; Cocceji, vii. 24 ; Hofæker, de eff., § 28 ; Bouhier, c. 28, No. 59 ; Hommel Rhaps. Quæst. vol. ii. obs. 409 ; Lauterbach. Diss. Acad. iii. 128, c. 9. No. 3 ; Cochin Œuvres, i. p. 153 ; Boullenois, i. pp. 494-5 ; Pütter Rechtsf. iii. pt. i. pp. 69-80 ; Titius, Ins. Pr. i. c. 10, § 21 ; Oppenheim, p. 393 ; Burge, i. p. 184 ; Wheaton, p. 115 ; Schaffner, p. 127 ; Fœlix, ii. p. 367, note 2. The Code Civil, in its 170th article, recognises the principle ; but in spite of that, neglect to publish the marriage in the way required by French law may in certain circumstances operate nullity of the marriage in France. See Fœlix, p. 382, as to the disputed meaning of the latter part of the 170th article, cf. Mittermaier, i. 16 ; Stephen, i. p. 243.

<sup>2</sup> Burge, i. pp. 169-199 ; Story, § 79a, but see the decision in § 80 to the opposite effect. Where the *lex loci actus* is infringed, it may, under certain circumstances, be doubtful whether there was any intention to enter into a binding contract. See *supra*, p. 139. For the validity of a marriage contracted in English form in a heathen country, or in an English settlement among heathens, see Story, 118-19. Marriages celebrated in the houses or chapels of English embassies according to English law will be held valid, Burge, i. p. 168. See, too, the judgment of the Supreme Court of Appeal at Dresden, of 21st June, 1845, reported by Seuffert, vol. ii. p. 6, by which a marriage contracted in Belgium between two subjects of Saxony, was held a legal marriage, although the Belgian regulations as to the celebration of marriages before a civil official, and the registration of the same, were not observed ; because, although the rule "*locus regit actum*" is put in force by the practice of the court, yet the law of Saxony must decide in the case of a legal transaction between two subjects of Saxony, the legal existence of which is recognised by that law, and the legal consequences of which the same law must determine. [Cf. *infra*, pp. 371-72.]

relation to marriages contracted abroad by their subjects although of course there are exceptions.<sup>3</sup>

Some writers make an exception to the rule in cases where the marriage is celebrated abroad, *in fraudem legis*, in order to avoid the forms prescribed by the law of the parties' own country.<sup>4</sup> We have already seen, however, *supra* p. 138, in discussing the rule *locus regit actum*, that in such a case the expression *in fraudem legis* is out of place. The laws of England and of America recognise at the domicile of the parties concerned a marriage celebrated abroad in conformity with foreign law, in spite of the stringent regulations as to banns and a religious ceremony laid down by the law of the domicile; and that even although the evasion of these forms which encumber the marriage ceremony may have been the sole motive for celebrating it abroad.<sup>5</sup>

So, too, in more modern times, some authors make an exception in the case where the law of the domicile requires some ecclesiastical ceremony, on the ground that an enactment of this kind has a moral and religious foundation, and therefore a coercitive character.<sup>6</sup> But, although the reason

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<sup>3</sup> *e.g.* A Bavarian proclamation of 12th July, 1808 (16), declares all marriages contracted by Bavarians abroad null (Felix, ii. 494). This law, on the grounds referred to above (§ 90, note 14), cannot be recognised as applicable to marriages contracted between Bavarian women and foreigners in a foreign country. If such a law exists in a country where there is a constitutional right of emigration, it must be read with reference to that right, and restricted to the marriage of natives with foreign women. [See p. 373.]

<sup>4</sup> Bouhier as cited; Wheaton as cited; P. Voet, c. 2, § 9; J. Voet in Dig. 23, 2, § 4.

<sup>5</sup> Burge, i. pp. 192-93; Story, § 123. In England such case have occurred remarkably often by reason of the well-known marriages at Gretna Green. See, too, the judgment of the Supreme Court at Berlin, 15th January, 1855, note 8. The declarations of the *Congregatio concilii* quoted by Richter, Kirchenrecht, § 246, note 15, no doubt are to a different effect, and an act *in fraudem legis* is by them considered possible. No doubt the *lex domicilii* of the husband can refuse to give effect to a marriage contracted abroad, if it is not performed in accordance with the forms of his country, as is done by the English Act for regulating the future marriages of the Royal Family, 12 Geo. III. c. 11; Burge, i. p. 193. It is otherwise with the provisions of the English Marriage Acts for subjects of that country. (See Story, note to § 124.)

<sup>6</sup> Savigny, § 381; Guthrie, pp. 323-24; Thöl, § 80; Gerber, § 36, note 16; Unger, p. 210.

assigned for the ecclesiastical ceremony is the true reason, that is no ground for holding that the rule "*locus regit actum*" is inapplicable. Even ecclesiastical lawyers have maintained the authority of this rule in such cases from an earlier date, where the law of the one country required ecclesiastical ceremonies, while that of the other was satisfied with the simple declaration of the marriage vows;<sup>7</sup> the Protestant Church has no reason whatever to reject its authority, since it holds marriage, on the testimony of the Reformers, to be merely a civil ordinance.<sup>8</sup> If a rule of law prescribing any such form of ecclesiastical wedlock had this coercitive character, then a marriage celebrated by foreigners according to the law of their original domicile, as a merely civil contract, must be held to be void if they shall afterwards come to live in the country where such a rule exists; and, indeed, foreigners in such a position could not be permitted to live together as married persons, if they happened to be in such a country even for a short time, for a law so strictly coercitive, like a law prohibiting slavery, does not merely prevent the relation which it forbids arising in its territory, but also forbids it to subsist there.<sup>9</sup> There will be an exception in the case of an express statutory enactment enjoining an ecclesiastical ceremony even in a foreign country.<sup>1</sup>

### *Note L.*

[The laws of Scotland, England, and America, as stated by the author, all reject the domicile of either of the spouses as

<sup>7</sup> See J. H. Boehmer, *Jus. Eccl. Protestant*, iii. lib. 4, tit. 3, § 42, p. 1290, and the citations there.

<sup>8</sup> Cf. for instance, *Libri Symbolici*, p. 355, and the thorough examination of the judgment of the Supreme Court of Berlin, 15th January, 1855 (*Decisions*, vol. 29, p. 380), which held an informal marriage at Gretna Green valid, although the law of the domicile of the spouses required the co-operation of the Church. English and American judgments are at one with this. See Burge and Story, *as cited*. See the *Declarationes* of the *Congregatio Concilii*, cited in note 4, with regard to the Catholic Church.

<sup>9</sup> See to the contrary, Savigny, *as cited*.

<sup>10</sup> So, *e.g.*, by a law of Würtemberg, 5th June, 1807. Laws of this kind, which are directed to the regulation of marriages in a foreign country, are very dangerous. See Story, § 124a.

the rule for determining the validity of the forms under which a marriage is concluded, and go so far as to refuse validity to a marriage celebrated in conformity with the forms of the domicile, but at variance with the *lex loci actus*, unless it has been celebrated in some country the forms of which cannot be observed by Christian people, or in the hotel of the ambassador of the nation to which one of the parties belongs. "The forms and ceremonies prescribed by the law of the place where the marriage is entered into must be observed; and if they are, the marriage is valid; if they are not, it is invalid, although the ceremonies actually followed were those of the place of domicile" (Fraser, Husband and Wife, p. 1309. Cf. also, Westlake, p. 54, and Story, §§ 80, 81; see, too, *Cabert v. Imqua*, Cour de Bruxelles, 21st Nov. 1875, for a recognition of the same principle in Belgium). Just as the law of the domicile may be observed by Christians in a heathen country, the courts of the United States have recognised the validity of a marriage celebrated between two Indians in Missouri according to Indian customs under the superintendence of an agent of the United States Government (*Boyer v. Dively*, 58 Miss. 510).

Scotland and the United States determine also all questions as to the capacity of the parties by the *lex loci contractus*, and that even although the parties may have resorted to the country where the marriage is celebrated for the express purpose of evading the restrictive laws of their domicile (Fraser, 1300-01). England, on the other hand, regards the capacity of the parties as a matter to be ruled by their personal law, *i.e.*, the law of their domicile, and has refused to sanction an English marriage between Portuguese subjects who were first-cousins, and therefore by the law of Portugal incapable of marriage. This decision was pronounced by the Court of Appeal reversing a judgment of Sir R. Phillimore (*Sottomayor v. Barios*, 1877, 3 P. D. 1). But the courts of England have recognised Gretna Green marriages between English subjects without the preliminaries required in England, and have also recognised a marriage in England between French subjects without the consent of their parents, an omission which would be fatal to its validity in France (*Simonin v. Mallac*, 1860, 2 S. and T. 67, and 29

L. J. Mat. 97). This decision is reconciled with that pronounced in the case of Sottomayor, by holding the consent of parents to be part of the ceremony, and not a matter affecting the capacity of the parties.

Belgium and France require in certain circumstances publication of notice of marriage in order to validate it. The English courts have recognised marriages of French people valid by the *lex loci contractus*, although no such publication had been made, just as they had recognised Gretna Green marriages; but the French courts, although they do not pronounce such marriages void, hold them to be voidable in the discretion of the court (*Desaye v. Clément*, 4th July, 1879, Trib. Civ. de Villefranche). If the marriage has been celebrated abroad *in fraudem legis domesticæ*, and in order to avoid publicity, then it will be annulled (*Sotty v. Sotty*, C. de Douai, 29th Dec. 1875; *Cour d'Appel de Bruxelles*, 13th Jan. 1873; *D'Alinegro v. Louis*, 28th Dec. 1876, Trib. Civ. de la Seine, *Ctesse. d'Imécourt v. Musurus Bey*, C. de Paris, 24th Feb. 1882). If false representations be made to the authorities of the country where the marriage takes place, this will raise a presumption of nullity, as being proof of a desire for secrecy (*Berthaut*, 12th June, 1879, Trib. Civ. de la Seine). On the other hand, where there is no evidence of a desire for secrecy, where, for instance, parties contract marriage abroad to avoid the delays consequent on publication, being desirous of emigrating to America speedily (*C. de Bruxelles*, 12th July, 1871), or where parties are resident in Brazil, and have no opportunity of observing French forms, while their conduct shows an absence of any desire for concealment (*Paumier v. Jouard*, 16th March, 1879, Trib. Civ. de la Seine), and generally where there is *bona fides*, the marriage so informally celebrated *secundem legem loci contractus* is good (*Bouchard v. Radot*, 14th June, 1876, Trib. Civ. de la Seine; *Desaye v. Clément*, C. de Cass. 14th Dec. 1880; *Lebon. C. de Rennes*, 27th Aug. 1879). Registration and publication have been held to be formalities the want of which can only be pleaded by third parties who have an interest in reducing the marriage; the spouses themselves cannot plead their own fraud (*Beaufils v. Denis*, 21st Nov. 1876, Trib. Civ. de la Seine).

In Italy publication is required, but the penalty for a

marriage contracted abroad without publication is not nullity, but merely a fine.

The validity of marriages in the hotels of ambassadors abroad is discussed *infra*, § 115, note. It is sufficient to say here that while marriages contracted there by two subjects of the power which the ambassador represents must be recognised, it has been decided in France and Austria that the same privilege cannot be accorded to such marriages where one of the parties is of another nationality.

A statute of the German Empire of 4th May, 1870, provides that German subjects may be married abroad, according to certain forms, before consuls and diplomatic agents specially authorised.]

### 3. DIVORCE.

#### § 92.

Divorce is in the same way subject to the law of the domicile of the spouses.<sup>1</sup> It can never be the purpose of any system of law to determine whether a marriage subsisting between foreigners is dissoluble, or to say on what conditions it may be dissolved. But while the law of any country where an action is brought may refuse to pronounce a divorce as contrary to morality if it be asked to do so upon grounds which it pronounces to be inadmissible, so, conversely, every ground of divorce which the law of the country approves must be unconditionally applied by the judge who has cognisance of the case, since the maintenance of the marriage tie in spite of these grounds for separation must be held to be just as much an offence against morality.<sup>2</sup> This difficulty, according to which the *lex domicilii* on the one side, but on the other the *lex fori*, would fall to be applied, is solved by the consideration that in actions of divorce—if there be no express statutory provision—the *judex domicilii* alone is competent, and we cannot admit any voluntary subjection of the parties to the law and the tribunals of another country, since it is not in their power to deal as they please

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<sup>1</sup> Burge, i. p. 689.

<sup>2</sup> Wachter, § 42; Schöffner, p. 159; Savigny, § 379; Guthrie, p. 298; Story, § 227.

with the subject of the action.<sup>3</sup> A decree of divorce, therefore, pronounced by any other than the *judex domicilii*, must be held to be inoperative.<sup>4</sup> If a different view were to

<sup>3</sup> Wheaton, § 151, p. 197. Gand, No. 390, and the practice of French courts; see, for instance, a judgment of the Court of Cassation, 14th April, 1818 (Sirey, xix. 1, pp. 193), 27th Nov. 1822 (Sirey, xxiv. 1, pp. 48-52), Cour Royale de Paris, 26th April, 1823 (Sirey, xxiv. 2, p. 65), Cour Royale de Metz, 25th Aug. 1825 (Sirey, xxvii. 2, p. 192), Günther, pp. 731-32. By the law of Baden, L. R. § 234, 102, the courts of Baden have no jurisdiction over the matrimonial suits of foreign spouses, unless they have obtained leave from the Government to take up their domicile in the country, and have done so, and thereby have the privilege of exercising all the rights of citizenship equally with natives, so long as they continue to reside there, or unless the case shall fall under one of the exceptions provided for in the 63rd paragraph of the Baden regulations as to marriage. In this paragraph it is provided: "If the wife shall acquire for herself a domicile in this country that shall not give rise to any right to obtain judgment in matrimonial suits with her husband; the dispute must be referred to the tribunal of the husband's domicile, unless he, with the approval of his Government, shall consent to prorogate the jurisdiction of the courts of this country," V. Hohnhorst, *Jahrbücher des Badischen Oberhofgerichts*, N. F. Jahrgang 2, 1834, p. 339. The revised statutes of Massachusetts of 1835, chap. lxxvi. §§ 9, 10, 11, declare that their courts shall on no account pronounce decree of divorce, unless the parties have lived together in Massachusetts as married persons. Further, no divorce shall be entertained by reason of any circumstances that have taken place in another country, unless the parties have lived together in Massachusetts as husband and wife before their occurrence, or unless one of them at the time of the occurrence of such circumstances was living in Massachusetts. By the 39th section, a divorce obtained in some other State by an inhabitant of Massachusetts, on the ground of some fact which took place in Massachusetts, and while the spouses were living there, is invalid, if the said fact would not be ground for a divorce by the law of Massachusetts. The statute of 1843, cap. 74, provides that decree of divorce may be pronounced on account of facts that have taken place in a foreign State, if the pursuer has resided for five years in Massachusetts before raising his action, Story, p. 348, note 1; see Püttlingen, § 59, *Oesterreichisches Hofdecret*, 23rd Jan. 1801; see too, Savigny, as cited. This principle is in no way transgressed if a different tribunal from that of the domicile is declared to be competent within the territory of the same State, that State having one system of marriage law. The other principles which regulate the operation of decrees pronounced abroad are excluded from consideration here.

<sup>4</sup> Judgment of the Cour d'Appel de Paris, 11th Feb. 1808 (Sirey, viii. 2, p. 86). See Burge, i. p. 690, who says: "It seems scarcely compatible with the respect which States owe and render to the laws of each other, that the tribunals of one should afford assistance to the subject of another State in withdrawing himself from the operation of a law which is obligatory on him. Nor is it required by any considerations for the supremacy of its own laws, that such assistance should be afforded." The courts of the different States



be taken, the subjects of a State could easily defeat the law by which they are absolutely bound.<sup>5</sup>

On the other hand, the place where the marriage was celebrated is of no importance. The theory<sup>6</sup> which proposes that the law of that place should rule, holds divorce to be a contract right of the spouses. If this opinion were correct, no law to regulate divorce could apply to marriages contracted before its promulgation.<sup>7</sup> But marriage, although it rests upon the intention of private parties, is a part of *jus publicum*, and the spouses are absolutely subject to the *jus publicum* of the place in which they are domiciled.

From this the next step is, that the domicile of the spouses at the date of the action, and not that at the date of the marriage, or of the event on account of which divorce is sought, must rule.<sup>8</sup> Some English judges, no doubt, contend that a marriage concluded in England can only be dissolved by English law; in later times, however, there seems to be

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of the Union in America refuse to recognise decrees of divorce pronounced in other States, if the parties were not domiciled there, Burge, i. pp. 691-93; Story, § 229a. The statute of Massachusetts cited in the last note makes that special provision.

The Courts of Scotland, whose practice has varied, have in some cases held that they had jurisdiction although the parties were not domiciled in Scotland—they have been inclined to regard a mere temporary residence as sufficient. The arguments specially urged in favour of this view, that residence in any country gives right to the protection of the law and the courts of that country, can never, considering the really permanent character of marriage, give jurisdiction to sever this enduring relation definitely, but merely confers power to separate the spouses temporarily, by provisional regulations, with a view for instance to protect the wife against the cruelty of her husband. See Gand, No. 424; judgment of the C. de Cass., 27th Nov. 1822 (Sirey, xxiv. i. pp. 48-52). There is just as little reason for referring to the event on which the action proceeds. No doubt some grounds for divorce, such as adultery, may be held to be delicts also; but the question whether these acts can dissolve the marriage, is quite distinct from the question by what law the delict is to be judged, Burge, p. 680. [For the present state of Scots law on this subject see note at the end of the paragraph, p. 380.]

<sup>5</sup> Schäffner, p. 160.

<sup>6</sup> Pütter, Rechtsfälle, iii. pt. 1, pp. 80, 85, 86.

<sup>7</sup> Burge, i. pp. 683, 684; Story, §§ 221, 222.

<sup>8</sup> Burge, i. pp. 682, 683, 388; Günther, as cited; Savigny, § 379; Guthrie, p. 299; Story, §§ 222, 228-29. Cf. the statute of 1843 for Massachusetts (Story, p. 348), *supra*, note 3.

an inclination rather to take the view that the acquisition of a *bona fide* domicile<sup>9</sup> in the country where divorce is sought is necessary, and is all that is necessary.<sup>10</sup>

It is true that the wife shares her husband's domicile ; but if the husband abandons the place of their common domicile, by the law of which the wife is entitled to divorce, she cannot be denied the privilege of raising her action of divorce there, so long as she does not actually follow her husband to his new domicile *animo remanendi*. The fact upon which she founds gives her a right to dissolve the marriage, and at the same time a right to choose a special domicile for herself. The latter depends, however, upon the former, and thus, if she should follow her husband to his new domicile, the law of that country will rule her rights also.<sup>11</sup> If the wife is refused this privilege, then the husband will be able at his pleasure to put an end to any just claim for divorce.<sup>12</sup>

The same principles which regulate the competency of courts in actions of divorce are to be applied to actions for declarator of nullity of marriage, with the proviso that if the wife has not actually followed her husband to his domicile, she may effectually raise an action in her own domicile. This is necessary to justify the assertion in

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<sup>9</sup> By *bona fide* domicile, English jurists understand a domicile *animo remanendi*. According to the terminology of the common Roman law there is no such thing as a domicile without this *animas*.

<sup>10</sup> Story, § 216; §§ 219 and 226c. Lord Brougham, too, has expressed himself to this effect in more modern times. See note to Story, § 226. Cf. Schäffner, p. 160.

<sup>11</sup> Story, § 229a. *Quid juris* in the case of a wilful desertion, where the wife does not know where her husband's domicile is? See Richter, Kirchenrecht, § 269, *ad fin.* The decree of divorce must in such a case be recognised even at the new domicile of the husband: the marriage law of a State can bind none but the citizens of that State, and the courts of this country can only pronounce decrees against their own citizens. If, therefore, only one of the persons in question belongs to the State, while the other is, by the law of her domicile, freed from the matrimonial tie, the view which would refuse to regard the subject of the one State as a single person would, by consequence, require a foreigner to submit to its rule, since marriage consists in a union between two persons. If both spouses change their domiciles, the court of the former domicile ceases to be competent. Story, as cited.

<sup>12</sup> See Fœlix, i. p. 362-63.

the action of nullity, that the wife has retained her former domicile.<sup>13</sup>

Lastly, there is a difference of opinion as to what law decides the capacity of the divorced party to marry again. Several French authors, proceeding on the assumption that the question is one as to personal capacity, have laid it down that the law of the place where the divorce was obtained cannot be pleaded,<sup>14</sup> and have referred exclusively to the law recognised at the subsequent domicile of the party. We have already remarked that almost all rules of law are capable of being expressed in the form of a deliverance upon the capacity or incapacity of a person, and therefore we cannot, from the mere use of the terms capacity or incapacity, infer that the *lex domicilii* should be applied, except where we find the definite conception of incapacity to act and to enjoy rights.<sup>15</sup>

But, as a matter of fact, to refuse to recognise the capacity of one who had obtained a decree of divorce in a competent foreign court to marry again, would be to deny the validity of that divorce. We may therefore assume that there is a capacity for a new marriage if that is allowed by the law which rules in the court that has competently pronounced decree of divorce. But it is only for its own citizens that the law of any country lays down certain bars to marriage, and not for persons who were citizens but have passed into the citizenship of another State. We must, therefore, recognise the capacity for a second marriage, if that is the law of any new domicile that may be acquired, although it may not be the law of the place of divorce.<sup>16</sup> The practice of the

<sup>13</sup> Demangeat on Fœlix, i. p. 363, note *b*, forgets this necessary assumption : so, too, Gand, No. 390.

<sup>14</sup> Here, again, the question arises, Is it enough that the divorced husband is permitted by the law of his own domicile to marry again, or must the *lex domicilii* of the woman who proposes to marry such a person, permit marriage with a divorced person? The Cour Royale de Paris, 30th Aug. 1824 (Sirey, xxv. 2, p. 203-04), took the latter view. (See, too, Fœlix, i. p. 68.) The Cour Royale de Nancy, 30th May, 1826, took the former.

<sup>15</sup> See *supra*, p. 164. In any case the expression is not applicable to single men who propose to marry divorced women, as is laid down by the decision reported in the preceding note.

<sup>16</sup> The opposite view cannot be justified either by referring divorce to the sphere of *jus publicum* or asserting that it concerns public order (Demangeat

United States is to hold a marriage valid if the spouses were capable of a valid marriage by the law of the place where the new marriage was celebrated.<sup>17</sup> But it would seem indispensable that these persons should have acquired a *bona fide* domicile there.<sup>18</sup>

*Note M, on § 92.*

[In determining on what principles the courts of any country will sustain their jurisdiction in divorce or separation, we shall also find an answer to the question what principles the courts of one country, when asked to recognise foreign decrees of divorce, require to be observed in those of that other country before they will recognise its sentences. If domicile be required in country A to found jurisdiction, its courts will not recognise a decree pronounced in country B upon an asserted jurisdiction *ratione delicti commissi*. The same rule, too, holds good with respect to the grounds of divorce; no law will recognise a foreign divorce pronounced on the ground of any infringement of the duties of the married state which is not held sufficient in its own country to warrant divorce; *e.g.*, the Scots courts will recognise divorces pronounced in foreign courts on the ground of adultery or desertion, but will refuse recognition to decrees pronounced on the ground of incompatibility of temper; and a Scots decree of divorce on the ground of desertion will not improbably fail to obtain recognition in a country which recognises adultery alone as a ground for dissolution of the marriage. All courts, too, especially those of America, will take care before recognising a foreign decree to see that it was not obtained without due notice and the observance of the regular forms; cf. *Shaw v. Att. Gen.* (1870, L. R. 2, P. and M. p. 156), where the husband had no notice of the suit "except an advertisement which he never saw and was never likely to see;" and a case decided by the Appeal Court of New York (*People v. Belker*,

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on *Felix*, i. pp. 68, 69), for the possession of this character does not necessarily exclude the application of foreign law. See *supra*, § 33.

<sup>17</sup> Story, § 89.

<sup>18</sup> As to the position of clergymen and officials whose assistance is required at a marriage of which their law disapproves, see *supra*, § 90, p. 366.

21st Jan. 1873), where it was held that a decree pronounced in another State against a citizen of New York, who was domiciled in New York, and had been in residence there during the action, could not be recognised.

A liberal acceptance of foreign judgments in such cases is made in France. Although the French law does not permit divorce, the courts of France will still recognise the effect of a divorce pronounced in a foreign court having jurisdiction, where one of the parties is French, and will allow the spouse returning to France to marry again, just as if he or she were single. This holds in cases in which the marriage was celebrated in France, and although, from the fact that jurisdiction for divorce is generally founded on domicile, the cases that have occurred have all been cases where the husband, whose domicile is the domicile of the marriage, was a foreigner, and the wife French, the principle would equally apply where a Frenchman by nationality had obtained divorce abroad after a *bonâ fide* residence of some duration (*Brune de Mans v. Guillamnin*, Trib. Civ. de Nogent-le-Rotrou, 7th June, 1878; *Plaquet v. Maire de Lille*, Cour d'Amiens, 15th April, 1880; and *Plaquet*, Cour de Cassation, 15th July, 1878. The last case was several times before the French courts, but was finally determined in a sense favourable to the recognition of the foreign decree). The Cour de Paris (13th Feb. 1872) decided that a foreign divorce was good in France, but, by an anomalous restriction of that recognition, required a delay of six months before the parties could validly marry again.

It will, then, be understood that a court, in exercising its own jurisdiction according to certain rules, and giving decree on certain grounds, implies thereby that it will recognise decrees of foreign courts based upon like jurisdiction and for like grounds.

The only principles of jurisdiction now recognised are domicile, and what has been called matrimonial domicile, *i.e.* residence of such a duration and such a nature by the spouses as married persons within any territory, as to justify either of them in holding that their matrimonial relations are to be determined by the law of that territory, and that he or she is therefore entitled to appeal to that law against any infringement of these relations by the other spouse.

The jurisdictions formerly claimed in Scotland by virtue of a residence by the defender for forty days, coupled with citation there, and in other cases by virtue of a personal citation in Scotland, and the fact of the commission of the adultery there, the *forum delicti commissi*, have now been distinctly abandoned (*Stavert v. Stavert*, Feb. 1882, 9 R. p. 519). In this case all the previous authorities on the subject were reviewed, and jurisdiction on these grounds rejected, and it was held that the mere fact of the commission of the adultery in the territory could not give the courts any right to deal with the *status* of the parties permanently.

Domicile, *i.e.* a complete domicile, such as would regulate succession, is admitted as founding jurisdiction for divorce not only in America, Scotland, England, and other countries where domicile is the ordinary ground for founding jurisdiction and determining capacity, but is also accepted as sufficient in France, Belgium, Italy, and countries where nationality and not domicile is the ordinary criterion for determining the status capacity and personal rights of every individual, and establishing jurisdiction. The American courts in New Jersey have refused to entertain an action instituted by a Canadian woman, who had been married to an American citizen in New Jersey, his domicile being in another State (*Blumenthal v. Tannenhole*, May, 1879, Chancery Court of New Jersey); and have also declined to recognise a divorce obtained in Utah without a domicile or residence being had in that State (Supreme Court of Minnesota, 25th April, 1878). A Frenchman who married a Belgian, and afterwards lived for twenty years in Belgium, was held to have acquired a domicile there, and therefore to be entitled to divorce according to the law of Belgium, in spite of the fact of his French nationality at the date of his marriage (*Vimenet, C. de Bruxelles*, 12th May, 1877). In this case there was complete *bonâ fides* in the residence in Belgium, an important consideration, as we shall see. The domicile in such cases is always the domicile of the husband, which is imputed to the wife. (In England, *Ratcliff*, 1859, 1 S. and T. 467; *Wilson*, 1872, L. R. 2, P. and M. 435. In Scotland, *Warrender v. Warrender*, 1835, 2 C. C. and Fin.

488 ; and 2 Sl. and M'L. 154). In France the nationality of a wife has in the same way been held to be sunk in that of her husband so as to entitle him to divorce her, being a Frenchwoman, in his own courts abroad (Van Overbecke, Trib. Civ. de la Seine, 13th April, 1880). A suit in Austria at the domicile of the husband was held competent, although the wife, who brought the action, was living at the date of the action, and had lived for the greater part of the married life with her husband in Italy (Supreme Court of Austria, 31st July, 1872).

There is also accepted as a ground for founding jurisdiction in cases of divorce a domicile of somewhat less completeness than is required for the purposes of succession. In Scotland it has been the opinion of eminent judges that "there may be a residence or domicile founding jurisdiction such as would not regulate succession, as where a husband and wife have been for years resident in Scotland as married parties, but where the husband, from being a foreigner, and only in Scotland on the public service, may never have acquired a domicile of succession in this country" (per Lords Neaves and Mackenzie, in *Jack v. Jack*, 7th Feb. 1862, 24 D. 467). "The impossibility of resting jurisdiction in divorce exclusively on the domicile of succession is obvious from other considerations equally cogent and conclusive" (per Inglis L. J.-C., in same case). This has since been recognised in Scotland as sound law, but Lord Westbury, in the House of Lords, in giving judgment in a Scotch appeal (*Pitt v. Pitt*, 4 Macq. 627), indicated a distinct opinion that this "matrimonial domicile," as it has been called, is not a good ground on which to rest jurisdiction. It was not, however, necessary for the decision of the case that this view should have been expressed ; it has not been put in force in any Scots judgment, nor is it consistent with the law of England as stated by the highest authorities (see *infra*). Inglis L. P., thus states the present state of the law in the case of *Stavert v. Stavert* (cited *supra*): "Now, a very important question arises in some such cases, whether the domicile necessary to found jurisdiction is the same as that which would regulate the intestate succession of the husband, or whether it is not sufficient that Scotland has been the

settled home of the marriage for some period with no intention of leaving the country, where the spouses have settled down to live, where the household gods have been set up for the time, and which, if a separation, judicial or otherwise, has been arranged, would be the place where one party owes the duty of returning for the restitution of the conjugal relations. . . . It has not yet been decided in the court of last resort" (*i.e.* the House of Lords) "whether it is so, and I merely notice the matter in passing. If the answer depended on the decisions pronounced by this court, it is pretty clear what it would be." His lordship indicates that the theory formerly adopted in Scotland of the sufficiency of such a domicile would still be applied by Scots courts, but his brethren, Lords Deas and Shand, in the same case, held that a complete domicile would be necessary.

In England there seems to have been the same question, and the same hesitation as to the sufficiency of any domicile short of a complete domicile; but the law, as it stands at present, is thus stated by Mr. Westlake (p. 75): "When the husband, being either petitioner or respondent, though not domiciled in England, is resident there, not on a visit or as a traveller, and not having taken up that residence for the purpose of obtaining or facilitating a divorce, the Court has authority to grant a divorce wherever the adultery was committed, or, if the husband be respondent, wherever the adultery and cruelty or desertion were committed." Cf. Niboyet, 1878, L. R. 4, P. D. 1, the tendency of which decision is to make residence and not domicile the ground for jurisdiction. The necessity of recognising in such matters some special ground of jurisdiction less stringent than that required in ordinary questions as to status or jurisdiction, has been indicated by the following decisions of Continental courts:—Such a domicile can be acquired without the loss of a foreign nationality (Cour de Cassation, 11th July, 1855); it was held to be acquired by a foreigner who had married a Frenchwoman, and who had lived in France for several years and carried on a trade there (*Klötz v. Klötz*, Trib. Civ. de Marseilles, 23rd April, 1875); domiciled foreigners will, in the discretion of the Court, be allowed to sue in French courts for *separation du corps*, the French law not sanctioning divorce, if neither party objects to the



jurisdiction, if public order and morals are not offended, and if the French court is *forum conveniens* (*Mazy v. Joly*, 16th March, 1878, C. de Nancy); in Switzerland, domicile will confer such jurisdiction without naturalisation (App. Court of Geneva, 6th May, 1876), and by a diplomatic convention of 1869, French and Swiss courts have conceded to each other mutual jurisdiction of this character. This has been observed in the Swiss decision just cited, and by the Court of Cassation in France (*Benweguen*, 1st July, 1878). This doctrine of "matrimonial domicile" has also been applied by the French courts to this effect, that a woman who has lived with her husband for a considerable period in France, is entitled to appeal to the French courts for a separation, although the husband has gone abroad; the object of his departure being to withdraw himself from French jurisdiction and to embarrass his wife in the pursuit of her remedies (*Ramondenc*, C. de Cass., 19th February, 1875; X., Cour de Chambéry, 27th August, 1877). The laws of England, Scotland, and America will also sanction the establishment of such a separate domicile by the wife, in order to prevent the husband from taking advantage of his own wrong (*Fraser*, p. 1289; 4 Phill. 349; *Wharton*, § 225; *Elder v. Reel*, American Reports, 414).

This temporary residence or matrimonial domicile (or, it may be, naturalisation in countries where nationality is a ground of jurisdiction) must, however, be genuine and not acquired collusively or for purposes of divorce (*Westlake*, *ut supra*); to prevent such jurisdiction from being exercised in France, and to protect public morals, the Minister of Justice will intervene (*Raunheim*, 27th April, 1875, Trib. Civ. de la Seine—a case of collusion); where a French couple fraudulently acquired Swiss nationality in order to obtain divorce, neither of them having ever left Paris, a second marriage contracted by one of the spouses, may be reduced by the other on the ground of the divorce having been obtained *in fraudem legis*; his or her own participation in the fraud is no bar, or even if it were, the Minister of Justice has a title to pursue (*Vidal*, C. de Paris, 3rd June, 1877). Another case of the same kind is reported, where a Frenchman, already separated from his wife, obtained Swiss nationality in Decem-

ber, 1874, and was divorced in the Swiss Courts in January, 1875 ; he married again in February, 1875 ; he had never left Paris, and it was shown that his foreign nationality had been obtained solely in order to further his second marriage ; this was annulled at the instance of the French Minister of Justice (Gravelle Des Vallées, 28th August, 1878, Trib. Civ. de la Seine). The Belgian courts have decided to the same effect, in the case of a Frenchman who had married a Prussian, and acquired Belgian nationality for the purpose of obtaining a divorce (C. de Bruxelles, 12th May, 1877); and in the case of the Princess Bauffremont, noted *infra ad fin*, the French and Belgian courts concurred in holding that a woman who had been married to a Frenchman, and separated from him in France by decree of the French court, could not, by acquiring a foreign nationality in a country where divorce was sanctioned, thereby convert her *status* into that of a divorced woman, so as to enable her to marry another ; it was held as proved that her intention in adopting the new nationality was to enable herself to marry again. In Austria it has been held, without any allegation of fraud, that the marriage of a woman, herself a Catholic, and married in Austria to a Catholic, is indissoluble, and that she cannot, by residing in another country and embracing Protestantism, escape a decree of nullity of the marriage contracted by her abroad, if she should again return to the jurisdiction of the Austrian Courts (Supreme Court of Austria, 17th Jan. 1871).

In Scotland it has been decided that although the desire to obtain a divorce may be one of the motives that induces a person to acquire a domicile in any country, or indeed be the principal motive, that will not prevent the court from exercising its jurisdiction if a genuine domicile *quoad omnia* be acquired (Carswell v. Carswell, 6th July, 1881, 8 R. 901, and Inglis L. P. in Stavert, *ut supra*). A matrimonial domicile could hardly be acquired under such circumstances either in England or Scotland, the foundation of that domicile as a ground of jurisdiction being the expectation of the parties that their married relations should continue to subsist in the territory to the law of which they appeal.

The courts of all countries will also give temporary remedies to injured spouses, even where they have no juris-

diction to affect their conjugal relation permanently ; residence of the husband in England will found jurisdiction for a judicial separation ; indeed, the English courts will exercise even a jurisdiction for divorce upon the ground of residence ; in Scotland, residence of the spouses, far short of that required to constitute a matrimonial domicile, will give the court jurisdiction in an action of separation and aliment (Fraser, 1294), and will enable it also to regulate the custody of the children. The Italian courts will authorise a wife to quit her husband's house in cases where they are not competent to pronounce any decree that will affect the relations of the spouses permanently (Nellinger *v.* Struve, App. Court of Milan, 15th February, 1876). The French courts will award aliment to an injured wife, give her the custody of children, and allow her the expenses of a journey to the territory where her divorce must be sought (Subercasseaux, Trib. Civ. de la Seine, 1st December, 1877) ; and even if the expense be the expense of a voyage to America, it will be allowed against the husband, and extra expense admitted on account of the delicacy of one of the children of the marriage, who was to accompany the wife (*ibidem*). There will be inquiry to see if there be a *probabilis causa*, but the application for aliment and for expenses *ad litem* may be made in the French courts although no judicial steps have been taken there (Stein *v.* Stein, Trib. Civ. de la Seine, 18th August, 1881). A French court may also put property under judicial management pending a divorce suit in a foreign court to which the French court is incompetent (Bédarrides *v.* Grabisheid, Cour de Cass., 19th April, 1878), but the aliment or protection will only be given for such limited time as is sufficient to institute the action in a foreign court, or, in the case of protection of property, to carry through that action (Van Overbecke, 13th April, 1880, Trib. Civ. de la Seine) ; interim aliment for children who have been awarded to the custody of the wife has also been allowed (Glover *v.* Glover, Trib. Civ. de la Seine, 21st January, 1880). See below, also, p. 387.

It has not been thought necessary to supplement the authority of the text by the citation of any German authorities. By the 12th and 13th sects. of the Civilprocessordnung of the German Empire, which has been in force

since 1st October 1879, domicile regulates the *forum* for all actions for which no exclusive jurisdiction is appointed ; and by sect. 18, the *forum* of one who has no domicile in the empire is settled by his residence ; § 568 provides,—“ In actions concerned with the dissolution, invalidity, or nullity of marriage, or with the re-establishment of married life, the court to whose jurisdiction the husband is generally subject is alone competent.”

It may be interesting to note shortly a case that depended before both the French and Belgian courts touching several of the points raised above, and was watched with interest by all Continental jurists ; it has already been partially reported by Lord Fraser (*Husband and Wife*, pp. 1307-08). The *Princesse de Chimay*, a Belgian, married the *Prince de Bauffremont*, a Frenchman, and resided with him in France, acquiring French domicile and nationality ; they were separated by decree of the French courts on the ground of his cruelty, and the custody of the children was given to the wife ; she thereupon went to Saxe Altenburg in Germany, taking her children with her, and was there naturalised ; by German law, a decree of judicial separation enables the parties to marry again, by French law it does not. Relying upon her new nationality she married *Prince Bibesco* in Berlin. The *Prince de Bauffremont* obtained from the Court of Cassation, in Paris, a decree of nullity of her marriage with *Bibesco*, on 18th March, 1878, on the ground that a woman merely separated from her husband could not acquire a new nationality, especially if, as was held to be the case, she attempted to do so in order to enter into a new marriage. Following out this judgment, the French court awarded the custody of the children to the father, on the ground of the mother's misconduct, and gave decree against her for pecuniary penalties if she should fail to give them up. Her father, the *Prince de Chimay*, had in the meantime died, and *Prince de Bauffremont* arrested his succession, to which his daughter was entitled, in order to satisfy the pecuniary penalties imposed by the French court. After various procedure, the Appeal Court at Brussels, on 5th August, 1880, found that the judgment of the French court as to the invalidity of the second marriage was sound, since it would be absurd to hold the lady to be

the wife of one man in France, and of another in Germany, but held that the French court had pronounced a decree *ultra vires* in imposing a fine to compel performance of their order to give up the children, and refused accordingly to give effect to the application of the Prince Bauffremont for decree of furthcoming, and loosed the arrestments.]

#### 4. PERSONAL RELATIONS OF THE SPOUSES.

##### § 93.

*Fourth.* The strictly personal relations of the spouses are undoubtedly ruled by the *lex domicilii*,<sup>1</sup> but the husband cannot exercise the rights which that law gives him over his wife in a country whose law holds such rights to be immoral.<sup>2</sup>

##### Note N, on § 93.

[The French courts hold that the personal relations of the spouses are determined by the law of the husband's domicile (*Caro v. Caro*, Bordeaux, 2nd June, 1875). In other judgments there had been a question whether the law of the husband's nationality or that of his domicile should prevail in such matters (*Brouski v. Brouski*, 23rd Feb. 1876, C. de Bordeaux); but the final decision, and the law accepted at present, is in favour of the law of the domicile, and an exception is made to the ordinary French rules of jurisdiction, by which suits between foreigners are not entertained, so that a wife can sue in France upon personal rights given her by French law, where there has been an intention of making a home in France, that intention being indicated by the establishment of a business in France (*Camoens v. Glisko*, 12th March, 1878, C. de Aix). In that case the place of the matrimonial domicile was held to determine all the personal relations of the spouses; and in the later case of *Kowalski v.*

<sup>1</sup> Phillips, § 24, p. 189; Wächter, ii. p. 185. Cf. Gand, N. 415.

<sup>2</sup> The husband cannot beat or lock up his wife in Germany, as he is permitted to do in certain circumstances in England. Stephen, ii. pp. 261-62; Story, § 111. [According to Westlake, p. 61, conjugal rights must be determined by the *lex fori*, and this is also the law of Scotland—Fraser, p. 1318. According to Story, § 198, the domicile of the marriage, or, if that is not clear, the domicile of the husband will rule.]

Kowalski (17th July 1879, Trib. Civ. de la Seine), in which the husband was by nationality a Pole, the same inference—viz., of an intention to submit the regulation of their rights to French law by making France the home of the marriage—was drawn from the facts of a French marriage to a French wife, a French marriage-contract, and a residence in France, and jurisdiction was accordingly exercised by the court to determine the husband's liability for aliment. Equity has established in such cases a legal category of matrimonial domicile, so much invoked in cases of divorce both in Scotland and the Continent, to do justice between parties who might otherwise find their rights indefinite, and the remedy for infringement of them beyond their reach. Cf. *supra*, p. 381 *et seq.* The doctrine of the English and Scotch law (cf. note 2) will not in practice be found to differ much from that adopted in the text, since the remedy will as a rule be sought in the *forum* of the domicile, and the Scotch courts will not determine any question of rights so as permanently to affect the marriage relations unless they have jurisdiction *ratione domicilii*.]

## 5. PROPERTY OF THE SPOUSES.

### (α.) REGULATION OF RIGHTS IN PROPERTY AT THE TIME OF THE MARRIAGE.

#### § 94.

It is a much disputed question, and one of the greatest importance, looking to the vast differences between various systems of law on the point, what law is to determine the rights of one spouse over the property of the other?<sup>1</sup> Our authorities have been specially concerned with this point, viz., whether, in the absence of a marriage-contract, the community of goods established by the *lex domicilii* extends to the real property which lies in another country, or whether the *lex rei sitæ* determines all questions connected with such property, without reference to the *lex domicilii* of the spouses.<sup>2</sup>

<sup>1</sup> As to contracts, see *infra*, § 98.

<sup>2</sup> All agree that the place of the celebration of the marriage does not decide. See Savigny, § 379; Guthrie, p. 292; Story, §§ 191, 199; Mævius in Jus. Lub. Proleg. qu. 4, §§ 19, 20.

The reason which is frequently assigned for the application of the *lex rei sitæ*<sup>3</sup>—viz., that the law which determines the rights of married persons in regard to their property, speaks of things only and not of persons—is not, as we have already seen, decisive,<sup>4</sup> nor is the other reason which is assigned—viz., that the authority of the lawgiver is confined to his own territory.<sup>5</sup> Lastly, we cannot appeal to the argument that it is contrary to the principles of sovereignty that foreign statutes should have any effect upon real property in another country.<sup>6</sup> If this were so, all questions of capacity to act, or of obligations, would have to be settled by the law of the place where the subject was situated, if that subject happened to be a right to real property. This much, and this much only, is true, that if, in accordance with the *lex rei sitæ*, some definite real right to such a subject cannot be constituted at all, or must be constituted in a particular form, then obviously the law of the domicile of the spouses will also pronounce that no such right can exist, or can only exist if the particular form prescribed shall be observed, as the case may be.<sup>7</sup> But this does not affect the question before us.

Those who adopt the opposite opinion allow the law of the domicile of the spouses to decide all questions, partly because the spouses by their marriage are held to enter into a tacit contract,<sup>8</sup> by which they agree that it is their purpose that the law of their domicile shall determine generally questions that arise as to their property; partly because laws which regulate property touch upon the *status* of the persons, and belong therefore to *statuta personalia*;<sup>9</sup> and lastly, partly for the

<sup>3</sup> The adherents of this theory apply the rule "*Mobilia personam sequuntur*" universally, and, according to this rule, all moveables are by a fiction found at the domicile of the spouses (Argentæus, No. 31; Massé, ii. No. 13; Burge, i. p. 617; Wharton, i. p. 113).

<sup>4</sup> See *supra*, § 5.

<sup>5</sup> Gaill, *Observat.* ii. 124, No. 4.

<sup>6</sup> See Story's Citations, § 148.

<sup>7</sup> This is no doubt the meaning of the 3rd Art. prop. 2, of the Code Civil. Cf. Demangeat on Fœlix, p. 214.

<sup>8</sup> Molinæus in L. 1, C. de S. Trin.; Cochin Œuvres, i. p. 703; Wächter, ii. p. 47; Hert, iv. 45; J. Voet, de Statut, §§ 18-20; Abraham a Wesel, de connub. bon societate, Tract i. No. 115-119; Danz, D. pr. R. i. § 53.

<sup>9</sup> Boullenois, i. p. 737; Maurenbrecher, § 144, note 10.

reason that it is the aim of the law to regulate all questions affecting the property of its subjects, and not questions as to the property of married persons who may happen to have property in its territory.<sup>10</sup> Some authorities give the husband, if the *lex rei sitæ* does not recognise a community of goods between the spouses,<sup>11, 12</sup> an *actio personalis*, to enable him to put his *communio* into force, although they refuse to concede to him an immediate real right in real property situated in another country.

Argentæus long ago refuted the first of these grounds.<sup>13</sup> At the bottom of the assumption of a tacit contract we find the mistake which we have already noticed, by which the rules of law that adjust these relations are held to be merely expressions of what may be presumed to be the will of the parties.<sup>14</sup>

<sup>10</sup> Thöl, § 80. This is partly, too, the assumption on which Savigny bases his argument (§ 379, Guthrie, p. 293), although he lays stress upon the voluntary submission of the spouses and their probable intentions. See Fœlix, i. § 90, p. 207. But this author illogically makes the *lex rei sitæ* the rule in reference to the régime dotale (§ 60, p. 124). See Demangeat, pp. 213-14. See, too, Demangeat on Fœlix, i. p. 218, note A, according to whom all provisions as to the property rights of married persons are subject to the Statut Personnel as results of the nature of marriage. The same ground is taken to justify a judgment of the Court of Cassation of the Rhine (Berlin, 24th June, 1827, Volkmar, p. 45). The following pronounce the *lex domicilii* to be generally applicable:—Seuffert, Comm. i. p. 237; Walter, § 46; Reyscher, i. § 82; Bouhier, cap. 26, No. 3; Eichhorn, § 307; Mittermaier, § 350; Göschen, i. p. 112; Holzschuher, i. p. 84; Wening Ingenheim, § 22; Günther, p. 731; Mühlenbruch, i. § 72 (with reference to L. 65, D. de jud. 51, which deals, however, solely with the competency of the court, and not with the application of the local law—Schäffner, p. 136); Puffendorf, Obs. 1, Obs. 28, § 6. Cf. Merlin, Rép. Communauté de bien, § 1, No. 3; Schäffner, as cited; Huber's view, § 19 and § 15, is not quite distinct. French practice is not yet fixed (cf. judgments in Sirey, 16 Q. p. 209-11, and 30, i. p. 91). But in modern times they seem rather to incline to the view by which the *lex domicilii* rules universally (cf. Fœlix, i. p. 210). [Cf. *infra*, p. 395, note.]

<sup>11</sup> Burgundus, i. 15, 16, 37; P. Voet, vi. 3, § 9; Rodenburg, ii. c. 5, § 9; Christianæus, Decis. vol. ii. Decis. 57.

<sup>12</sup> The former domicile of the wife does not of itself determine the question, even although she does not leave it after celebration of the marriage. See Judgments of the Court of Appeal at Berlin, 19th Feb. 1856, and 4th May, 1857 (Striethorst, 20, p. 182, and 24, p. 256).

<sup>13</sup> No. 33. See Thöl, § 44.

<sup>14</sup> See *supra*, § 69.



If there were a tacit contract as to the property of the spouses implied in every marriage, persons who undoubtedly have the capacity of contracting marriage, but not of binding themselves by any special contracts as to their property, could never come under these statutory provisions; and against this tacit understanding, as against every other understanding which expresses itself in acts, there would be rights of reduction and restriction. But neither of these results is recognised.

The second ground, as we have already noted in our discussion of general principles, has no more application than the argument used on the other side, that the laws here in question principally deal with things.

On the contrary, the third ground is undoubtedly just in itself. It does not, however, by any means require that the *lex domicilii* shall be uniformly applied, but only upon the assumption that the estate of the person can really be regarded as an *unum quid*. If each separate asset constitutes a separate estate, whose fate is quite separate from the fate of the rest of the estate, it can scarcely be said that the *lex domicilii*, in claiming to rule the rights of the spouses in their property, intended to regulate these rights in regard to assets which are situated in a foreign country. But by the principles of German law, it is certainly not true that every asset constitutes a separate estate. The whole sum of moveables is regarded as an *unum quid*, but the individual parcels of real property are each regarded as separate estates, and the succession to them may be regulated by legal principles—such as those of feudal law—quite different from the principles that regulate the succession in moveables. By older German law, and by modern English law, which retains the same principle,<sup>15</sup> the law of married persons' property is a law dealing with the acquisition of rights in separate parcels of property, moveables being always excepted, since they, in a proper legal view, reflect the personality of the husband, and must therefore be figured as situated at his domicile.<sup>16</sup> By this legal con-

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<sup>15</sup> See Beseler, ii. pp. 486-88. [*Infra*, p. 395, note.]

<sup>16</sup> *Mobilia personam sequuntur*; see *supra*, §§ 59, 61.

ception, immoveables follow the *lex rei sitæ*; moveables, the *lex domicilii*; whereas, by Roman law, in which property forms an *universitas* without any distinction between moveables and immoveables, both kinds are subject to the *lex domicilii* alone. This is the explanation of the course of practice adopted by the English common law, and also of the circumstance that the older French authors, who specially deal with the conflict of law on this subject, fall into two classes. The first keeps in its view the *coutumes*, along with the Germanic conception of property, and therefore asserts the universal application of the *lex rei sitæ*; the second is more closely allied to Roman law, and takes the *lex domicilii* as its rule.<sup>17</sup>

But it by no means follows, when we find a territorial system of law distinguishing between moveables and immoveables in its provisions as to the property of married persons, that the law of property is founded upon the Germanic conception of estate. It may very well be that the origin of the distinction or its retention is an anomaly which has no justification but practical convenience. For instance, all the moveable goods which belonged to the spouses before marriage fall under the community, in contrast to the immoveable, because they can be easily collected under the domestic roof of the married pair, and cannot, therefore, easily be distinguished the one from the other.

The real touchstone is rather the theory of succession.<sup>18</sup>

If the succession is held to be an universal succession,<sup>19</sup> then the Roman conception of the estate as one whole is fundamental; and this conception is no more impaired by any special view which may be taken of all or any parcels of immoveables, for the purpose of determining questions

<sup>17</sup> The practice of the Parliament of Rouen asserts the *lex rei sitæ*, that of Paris, the *lex domicilii* as the rule. Argentæus has immediately in view the *coutumes de Bretagne*, and the feudal principles on which they rest; while Boullenois, as President of the Parliament of Dijon, follows the theory of Roman law. See Boullenois, i. p. 798; Bouhier, as cited; Demangeat on Fœlix, i. p. 211.

<sup>18</sup> See the law of succession, § 107 *et seq.*

<sup>19</sup> But neither the Roman nor the German law applies the principles of an universal succession to the law of married persons' property. Savigny, § 379; Guthrie, p. 293.

between spouses, than the Roman theory is by the special provisions as to the *fundus dotalis* in contrast with the moveables which the husband receives *in dotem*. And in the same way, in French law, although a distinction between moveables and immoveables is recognised for the purposes of the *communauté*, the theory which makes the *lex domicilii* decide is approved, just as it is by the Prussian Allgemeines Landrecht.

It is necessary, however, that both the *lex domicilii* and the *lex rei sitæ* should entertain this conception before it can be practically applied in any particular case to foreign immoveables. If the former has not the notion of the estate as a whole, it will make no rules for foreign real property; and if the *lex rei sitæ*, on the other hand, has it not, it will treat the law of property of the spouses as a real right in individual things, which must be subject to the *lex rei sitæ* alone.<sup>20</sup> It is therefore impossible to give one answer to the question which will be generally applicable.<sup>21</sup>

It cannot be objected to the determination of questions of property between the spouses by reference to the *lex rei sitæ*

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<sup>20</sup> The fact that French law only applies the rules of the *communauté* in the absence of any different stipulation between the spouses will explain the apparently contradictory decision of the Parisian Court of Cassation of 30th January, 1854, quoted by Demangeat on Félix, i. p. 216. We cannot conclude, therefore, that there is any community when an Englishman acquires an estate in France, even although he has been naturalised; for if it has once been validly excluded, it will not be affected by change of domicile. See *infra*, § 96; and Demangeat on Félix, 1, pp. 213-14 and 208.

<sup>21</sup> The same principles regulate the provisions which many systems make for the widow, differing from succession (*vidualicium*, *dotalicium*, *douaire*, *coutumier*, *dower*). Many authorities who make the *lex domicilii* govern other questions, make the *lex rei sitæ* the rule here. Boullenois, ii. pp. 57, 58; Burgundus, i. pp. 50, 51. (The latter, no doubt, makes an exception where the law of the domicile covers all property *ubicunque sitæ*.) Rodenburg, ii. p. 2, c. 5, § 5; and J. Voet, 23, 4, § 27, pronounce for the *lex domicilii*, but only in so far as the law of the domicile is not expressly limited to native real estate. The result of this view coincides with our own. Cocceji, De fund. vii. 19, and Burge, i. p. 635, pronounce for the general application of the *lex rei sitæ*; while Bouhier, chap. 25, No. 44, would have the *lex domicilii* the general rule. [In Scotland terce and courtesy as rights in land are regulated by the *lex rei sitæ*; *jus relictæ*, as a right in moveables, by the *lex domicilii*.]

in the circumstances, and to the extent indicated, that, on the one hand, we shall defeat what probably is the intention of parties, and thereby cause the greatest inconvenience ; while, on the other hand, the husband, if he should have the power of alienating landed property, or investing sums of money in such property, will, by reason of the variety in the land laws of different countries, have a dangerous power of settling as he pleases what law is to regulate the property of the spouses, and what rights each is to have in it. The first argument rests upon a circle. Parties are not entitled to hold that the *lex domicilii* is universally applicable if one of the spouses possesses foreign estate, and it cannot be proved that they proceeded upon this assumption ; at least, the opposite may be just as easily assumed. The second argument is much more a description of the effect of the rights which the husband originally had in the subjects alienated, than of the consequences of our theory as to the conflict of laws. If he cannot by the *lex rei sitæ* alienate landed property, nor change the investments of the funds without his wife's consent, then this dangerous power is fully excluded. If the application of the *lex rei sitæ* is sound, the whole matter stands precisely as if within the territory of one and the same system of law there were particular regulations as to the property of spouses in particular kinds of estate, *e.g.* manorial or peasant holdings. These would be treated in such a case as separate estates.

Our view is confirmed by the fact that many authors<sup>22</sup> who take the *lex domicilii* as the general rule, make an exception in the case where there is some prohibitive statute—*e.g.* a statute whereby the community of goods does not extend to property acquired by inheritance—in force. In the cases contemplated by these authors, the result no doubt shows that the *lex rei sitæ* is to be preferred, but not because the law that interferes is a prohibitive statute. For a statute of that kind can have no other object than the interest of the subjects of the State to which it belongs, so that it does not affect strangers who do not possess property there ; an instance

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<sup>22</sup> Bouhier, cap. 26, No. 19 ; Burgundus, as cited ; Boullenois, pp. 753, 796-97.

is the Roman law, which forbids donations between spouses.<sup>23</sup> The true reason lies in this, that the limitations which these authors have in view have their origin in the older German law, and have no further meaning than to ensure the rights of the nearest heirs in the estate. But no one has ever doubted that this is regulated by the *lex rei sitæ*.<sup>24</sup>

<sup>23</sup> See *infra*, § 97. Wächter, ii. pp. 362, 198, roundly asserts the application of the *lex domicilii*, because any statute which regulates the property of the spouses has regard to persons and not to things, and in doubt must be held to take cognisance of none but its own subjects.

<sup>24</sup> A judgment of the Court of Cassation of Paris, 4th May, 1829 (Sirey, xxx. 1, p. 191) affirming one of the Cour Royale at Rouen, declares the 329th and 330th Articles of the Coutumes of Normandy, which only allow a certain part of the conquêts of the wife to pass to the spouses, to be real statutes, which are to be applied to foreign spouses who, by the law of their domicile, live in complete community of goods. The reasons assigned for this, viz., "*Le statut est personnel, lorsqu'il régle directement et principalement la capacité ou l'incapacité générale des personnes pour contracter—le statut est réel, lorsqu'il a principalement et directement les biens pour objet,*" certainly do not warrant the result.

[Writing in 1882, Bar says, on the subject of this paragraph: "It is now unquestionably the prevailing opinion in Germany and Italy, and in France it has recently come to be more and more accepted, that cases as to the property of married persons, particularly as to the right of the husband over the wife's property, depend on the law of the domicile (or the nationality), without regard to the *situs* of real property included in it, or to the place of the celebration of the marriage; it has also been recognised in the Prussian Allgem. Landr. ii. 1, §§ 350-51; and in Statute-Book of Saxony, § 14."

By the law of England land situated in England is not affected by any other marriage law than that of England; the law of the domicile at the date of the marriage, *i.e.*, of the husband's domicile, or of a domicile acquired by him immediately thereafter, which at the date of the marriage he had it in view to acquire, will regulate the rights of the spouses in moveable property. This is also the law of Scotland (Fraser, 1323-24); and conversely, real estate situated out of England or Scotland, as the case may be, is not subject to any of the rules of English or Scottish law to any effect, and specially with regard to the present topic, is not subject to be affected by the rules of English or Scottish law as to the property or administration of married persons' estate, or the succession of the survivor at the dissolution of the marriage.

It has been held by the French courts that, in determining whether the provisions made by a predeceasing husband in favour of his widow do or do not exceed one-fourth of his whole estate, which is the limit set by French law to his powers, it is incompetent to take into account real estate situated abroad (Leroy de Chaumont, 21st May, 1879; Trib. Civ. de la Seine). As to the effect of an English marriage-contract upon the succession of the spouses,

(3.) CAPACITY OF THE WIFE—ALIENATION OF THE *Fundus Dotalis*.

## § 95.

The *lex domicilii* is the only rule for determining whether the wife is to be held capable of acting, and if so, to what extent.<sup>1</sup>

Care must be taken not to confuse this question with that discussed in the preceding paragraph—viz., what rights one of the spouses has over the estate of the other. The point of distinction lies in this, that in the case of incapacity on the part of the wife, she cannot undertake any obligation at all without the concurrence of her husband, whereas the effect of her husband's rights over her estate is that she cannot affect the estate so subjected to her husband's authority. These two questions are frequently confused with each other, and this is the origin, in a great measure, of the disputes which prevail on this subject.<sup>2</sup>

Now by English law there is a true incapacity in a married woman. An obligation undertaken by her without her

when that succession opens in France (cf. the case of Noireterre, cited *infra*, § 96, p. 403).]

<sup>1</sup> Argentræus, No. 7; Rodenburg, ii. 1, § 3; Boullenois, p. 200; Burgundus, ii. 7; Burge, i. p. 256; Chassenæus in Consuet. Burgund. Rubr. 4 tit. "*Des droits et appartenances à gens mariés*" in connection with "*contraux entre les vifs*," No. 18; Schöffner, p. 57 (judgment of the Court of Cassation of the Rhine, at Berlin, 14th Dec. 1852); Seuffert, vii. pp. 166-67). Burge remarks: "There is little inconvenience in requiring that a person who deals with a female who from her sex may be a married person, and subject to certain disabilities, should inquire, whether she be married, and what is the degree of disability to which her coverture subjects her. If he does not by inquiry satisfy himself . . . it will be the effect of his own neglect." See, too, Story, § 66 and 136; Renaud, i. § 42. [The law of Scotland will regulate such contracts by the capacity of the married persons at the place of the contract. In America it is a question of circumstances, Fraser, pp. 1317-18; see note, p. 202, as to capacity of married women.]

<sup>2</sup> We shall recur to this distinction again in dealing with the question as to what consequences flow from a change of domicile subsequent to marriage. See, too, the judgment of the Supreme Court of Appeal at Wiesbaden, 18th May, 1858 (Seuffert, xii. p. 322), which laid down that the right of a native subject to enter upon a transaction affecting the property of married persons must be determined by the law of his own country, even although the transaction has been concluded abroad.

husband's concurrence has no binding force against her, even after dissolution of the marriage.<sup>3</sup>

In the same way, by French law a married woman who lives with her husband in the statutory community of goods is incapable of acting.<sup>4</sup>

These provisions fall to be applied with reference to such real property abroad as the wife may happen to possess.

The prohibition of the Roman law against alienation of the dower estate is a particular case of partial incapacity. The spouses are by this disabled from dealing with an asset of their estate during their lives, except in certain cases.<sup>5</sup> The result is, that this prohibition, depending upon the *lex rei sitæ*, does not apply to foreign spouses by the law of whose domicile no such prohibition exists. The special protection which the law by this provision proposes to give the spouses, cannot be extended to foreigners, by the law of whose domicile such protection appears to be unnecessary or even mischievous. But, conversely, according to the usage recognised all over the Continent of Europe,<sup>6</sup> transaction is null if the *lex domicilii* pronounces it to be so,<sup>7</sup> although there is no logical justification of this. We find an analogy in the case of a person declared to be major in terms of the common law of Rome by means of a rescript of the sovereign. He, too, cannot alienate landed estate,<sup>8</sup> although he is free to dispose of all other property.

On the other hand, the question whether property in a

<sup>3</sup> Stephen, ii. p. 267; Burge, i. p. 203.

<sup>4</sup> Code Civil, art. 1427.

<sup>5</sup> Cf. *supra*, § 44.

<sup>6</sup> English jurists are forced to recognise another exception in this case to their general principle that the *lex loci actus* alone should rule, a principle to which we have already noticed one exception in note 1.

<sup>7</sup> Bouhier, chap. 27, No. 14, and Demangeat on Fœlix, i. p. 214, answer the question as we have answered it in the text; Burge, ii. p. 870; Duplessis, Consuet. Œuvres, ii. p. 259; Gand, No. 652; Fœlix, i. § 10, p. 124, pronounce in favour of the *lex rei sitæ*.

<sup>8</sup> If judicial permission is necessary for the alienation of the *fundus dotalis*, the *judex domicilii* is competent. Cf. law of Hanover, 30th July, 1840 (G. S. i. p. 35) § 1. "The alienation or impledgment of a dower estate is only to be held good upon the ground of benefit thereby accruing to the wife, if the contract is authorised by a judge who is personally competent."

dower estate can be acquired by prescription depends upon the *lex rei sitæ*, and not upon the *lex domicilii*.<sup>9</sup>

We have already discussed the question by what law the statutory right of pledge of the wife in respect of her dowry is regulated (see *supra*, p. 251).<sup>10</sup>

#### (γ.) CHANGE OF DOMICILE BY THE SPOUSES AFTER MARRIAGE.

### § 96.

If the spouses change their domicile after marriage, they do not thereby, according to the view which is now adopted by the great majority of authors, and sanctioned by the weight of practice, alter at all their rights of property ;<sup>1</sup> not

<sup>9</sup> See above Law of things and § 44, note 7. Care must be taken not to confuse the prohibition of the Roman law against alienation of the *fundus dotalis* with the prohibitions attached by German law to the alienation of particular parcels of estate on account of the rights of the next heirs. A judgment of the Court of Cassation at Paris, 17th February, 1817 (Sirey, xvii. 1, p. 422), declared that the old Norman statute, which provided that a wife *séparée de biens* should not have the power of alienating a real dower estate without her husband's leave and the advice of her nearest relatives, was a real statute, and that accordingly the sale of such an estate, before the publication of the Code, by a married woman resident in Paris, was invalid. Cf. Boullenois, i. p. 739-50, 798-99.

<sup>10</sup> See, however, the judgments of the court at Montpellier, 15th January, 1823 (Sirey, xxiii. 2, p. 301), and of the Court of Cassation at Paris, 16th January, 1824 (Sirey, xxv. 2, p. 482, note), which settle that where a marriage has been contracted abroad by a Frenchman before a foreign authority, it will not give rise to the statutory rights of pledge over the dower estate of the wife, until the marriage has been published by being entered on the register of civil status in France.

<sup>1</sup> P. Voet, 9, 2, No. 7; Hert, iv. 48-9; Rodenburg, ii. p. 2, c. 4, § 3; J. Voet, in Dig. 23, 2, § 87; Burgundus, ii. 15; Molinæus, in L. 1, C. de S. Trin.; Hofæker, Principia, § 143, *ad fin.*, Seuffert, Comm. i. p. 238; Bouhier, c. 22, No. 21; Alderan Mascardus, Concl. 7, No. 62; Pfeiffer, Prakt. Ausf. ii. p. 263; Hagemann, Prakt. Erört, 6, p. 142; Reyscher, i. p. 82; Harum in Haimel's Magazine, viii. p. 398; Funk im Archiv. für Civilpraxis, vol. 22, pp. 93-126; Boullenois, i. pp. 509 and 802 (where he expounds the older French practice, and shows how it coincides with our theory); Wächter, ii. p. 51; Holzschuher, i. p. 83; Schäffner, p. 137; Fœlix, i. p. 214, § 91, and Demangeat in his note to Fœlix, i. p. 216; Puchta, Lectures, § 113; Puffendorf, Observ. ii. obs. 121, § 2; Mittermaier, § 400; Glück, Comm. xxv. p. 269; Danz, i. § 53, p. 183; Beseler, ii. § 133. In accordance with this is the more recent practice in Hannover (Grefe Hannoversrecht, Hannover, 1861,



that there is, as used to be thought, any tacit contract as to these rights coincident with the celebration of the marriage, but because, as Savigny properly remarks, on the one hand, in so far as the law of the new domicile permits the law of their property to be altered at the private caprice of the parties, it can only be applied to the marriages of those persons who already belonged to the State at the time of the marriage; and on the other hand, the law of the first domicile must have intended to regulate permanently the patrimonial relations of the spouses.<sup>2</sup> It may be assumed that these laws are to determine questions of property arising out of these marriages, and not to unsettle questions already determined by another law; while, on the other hand, we must concede at least the same enduring force to the statutory provisions which take the place of a contract, as we should undoubtedly be obliged to concede to a contract.<sup>3</sup> In the opposite view, the relations of the spouses as regards their property would be thrown into the greatest uncertainty, particularly as regards the wife, since the husband has, to a certain extent,

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ii. § 20), which is now sanctioned by statute and has the force of law in Hanover, and so, too, the express provisions of the Prussian A. L. R. ii. 1, § 350. Judgment of the Supreme Court of Appeal at Munich, 3rd November, 1841 (Seuffert, i. p. 155-56), of the Supreme Court of Appeal at Wiesbaden in 1841 (Seuffert, x. p. 322), at Jena, 18th August, 1843 (Seuffert, xiv. p. 161), of the Provincial Court of Cassation and Revision in Rhenish Hesse, 1st June, 1826 (Archiv. 2, p. 289).

<sup>2</sup> See, for instance, the ordinance of Lippe, 1786, § 32 (Kraut, § 199, 1) :—“A change of the domicile of the spouses, if they betake themselves to a foreign country where the community of goods is not known, cannot alter or abrogate that community—and this is true whether (1) they should affect something of the kind by a special bargain; or (2) that some special enactment of the country of their new domicile should forbid that community of goods.

<sup>3</sup> Gerber, D. Privatr. § 229: “It is a necessary result of the relations of the spouses in matters of property, that where we have a marriage recognised by law we have not merely the possibility of the application of particular rules of law, but also a positive and enduring shape given to all the relations of the spouses in matters of property, from which a whole series of mutual rights and obligations arise; these legal relations resulting from a marriage are not subject to the operation of the code of the country in any other sense than every legal relation is, and in particular it does not follow that because they were originally established by the law of the domicile that when the husband shifts his domicile it is transformed into the shape prescribed by the law of that new domicile.”

the uncontrolled power of altering his wife's domicile and his own.

If it is urged in support of the proposal to determine the law of the property of the spouses by the law of the new domicile,<sup>4</sup> that on the one hand there is no such tacit contract, and, on the other, if there is no special contract, then the law of the property of married persons is to be gathered from the law of the place ; and so when the spouses emigrate to another country, where another law prevails, they must be taken to submit themselves to a new system ;—the first statement is, no doubt, correct in itself, but not fit to meet the reasoning of Savigny just quoted ; the second is incorrect, because there is an assumption which is not proved, and which our previous reasoning shows to be wrong, to the effect that the law of the new domicile will innovate upon rights of property already established, and that the law of the former domicile did not intend to fix permanently what the relations of the spouses should be as regards their property.<sup>5</sup>

An intermediate theory proposes to subject all property acquired after the change of domicile to the law of the new domicile, and leaves the law of the former one to rule all property acquired before that change.<sup>6</sup> In support of this there is cited the doctrine which we have already refuted, that the permanent dependence of all questions of property between the spouses upon the law of the first domicile can only be justified by the assumption—an erroneous assumption—of a tacit contract ; and then those who would make the *lex rei sitæ* the rule, adduce this consideration, that in the eye of the law moveables are always situated at the actual

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<sup>4</sup> Günther, p. 371 ; Malblanc, Princ. Jur. Rom. § 65, *ad fn.* ; Ricci, p. 597-98 ; Eichhorn, § 307.

<sup>5</sup> A judgment of the Supreme Court of Appeal at Lübeck, on 30th Dec. 1859 (Seuffert, 14, pp. 162-63) is instructive : it does, no doubt, in itself pronounce the theory attacked in the text to be sound, but proposes still to investigate the question whether the law of the new domicile will really regulate the relations of the spouses as regards their property.

<sup>6</sup> Huber, § 9 ; Hauss, pp. 31-2 ; Kierulff, § 5, p. 73 ; Burge, i. p. 622 ; Story, § 178, 187. So, too, according to these authorities, the practice of the common law of England and America, and the jurisprudence of Scotland. [See *infra*, p. 403.] See, too, the judgment of the Supreme Court of Appeal at Kiel, 26th Nov. 1845 (Seuffert, 7, p. 162).

domicile of the party in right of them. But this second consideration does not support the intermediate theory, but rather the second theory, which does not except the property already acquired by the spouses from the law of the new domicile; it is not, however, well founded, for the rule "*mobilia ossibus inhaerent*" merely signifies that in certain circumstances moveables, according to the laws of all civilised peoples, constitute an *universitas*.

If, in the last place, it is contended, in opposition to the theory we have adopted, that parties contracting with married persons are entitled to rely upon the legal conditions of that relation as recognised at the seat of their present domicile,<sup>4</sup> we cannot affirm this contention, unless every marriage which is celebrated in that country necessarily involves the statutory relations of that country as regards property, or, if it is celebrated elsewhere, can only continue to subsist in that country under these relations;<sup>5</sup> or unless there is some special publication required of any modification or exclusion of the statutory legal relations between spouses; and in the latter case, too, the proposed rule would only affect the claims of creditors against the spouses, and not the rights of the spouses against each other.<sup>6</sup>

If the husband, immediately upon the celebration of the

<sup>4</sup> Boullenois, i. p. 537; Runde. Eheliches Güterrecht, § 166, 8, *ad fin.*; Schäffner, p. 144. The *bona fides* of the creditor will, according to a judgment of the Supreme Court of Appeal at Wiesbaden, 26th April, 1825 (Nahmer, ii. p. 474), open the door to the decision of the case by the *lex domicilii*, if that is to his advantage.

<sup>5</sup> In this case the law of the new domicile will be applied (Wächter, ii. p. 55; Savigny, § 379; Guthrie, pp. 296-97). See, too, the judgment of the Court at Celle, cited in note 1, *ad fin.*

<sup>6</sup> Cf. judgment of the Supreme Court at Berlin, 26th Oct. 1860 (Seuffert, 14, p. 340): "When intimation is required as a necessity, the law of the territory must be recognised to this effect, that so long as this intimation is not given the spouses must be held, so far as their relation to others is concerned, to be living in the ordinary community of goods. This territorial law must also be applied to married persons coming from a foreign country." It is also urged that the judge cannot be expected to know the law of the former domicile. See, on the other hand, Schäffner, pp. 142-43. By the law of Hamburg, contracts of marriage are of no force in questions with creditors, except it should happen that the wife possesses some separate estate acquired from a third party (Baumeister, Hamburg Privatrecht, ii. p. 95).

marriage, leaves his domicile, then it is the law of the country to which he repairs then, or immediately thereafter, that rules, and not the law of his former domicile ; for it is in the new domicile that the marriage truly has its origin. But a mere intention is not sufficient : that would only be true if we should assume a tacit contract. If, then, the husband fails to acquire the domicile he desires, then it is the earlier domicile, or another that has really been acquired which rules, even although he may have lived some part of his married life in the place which he desired to make his domicile.

If the legal relations between the spouses do not take their rise from the date of celebration of the marriage, but are associated with some more remote event, such as the birth of a child, it is the domicile which the spouses had at the date of the marriage, not that which they had when this event occurred, that rules. The marriage was constituted at the former, not at the latter place ; and the place at which the condition is purified can be of no more importance here than in any conditional contract.<sup>7</sup>

We must not confuse the invalidity of transactions entered into by the wife without her husband's consent, which is a consequence of the right which the husband has over his wife's property, with the invalidity of any transaction which depends upon the incapacity of the woman to act for herself. The former are regulated by the law of the original domicile ; but the woman's incapacity, and the statutory guardianship exercised by her husband, must be settled by the law of their domicile at the time of the transaction.<sup>8</sup> It is to the neglect of this distinction that the origin of many of the mistaken theories stated above may be traced.<sup>9</sup>

### *Note O, on § 96.*

[Lord Fraser (*Husband and Wife*, p. 1326) thus states the question raised in the foregoing paragraph : " Suppose a

<sup>7</sup> Schäffner, p. 138.

<sup>8</sup> So, too, a judgment of the Supreme Court at Berlin, 19th December, 1859 (*Seuffert*, 14, p. 6).

<sup>9</sup> *Boullenois*, ii. pp. 14, 15, 24, 25 ; *Duplessis*, (*Œuvres*, ii. p. 158 ; *Beseler*, ii. p. 383. Cf. *Story*, § 136 *et seq.*

husband not entitled *jure mariti* to carry off all his wife's personal estate by the law of the matrimonial domicile, can he, to whom the law gives the power of changing the domicile at pleasure, do so to the effect of subjecting the wife's property to a law by which it is assigned to him? . . . Can her husband change the domicile from England to Scotland, and demand all the personal estate as belonging to him, in virtue of the *jus mariti* given him by the law of the new domicile, and plead that the English statute" (limiting his rights in certain kinds of personal estate) "was a local law which had no extra-territorial force? There is no decision to this effect, and the contrary is maintained by eminent jurists, who are very decided on one point—that if such change of domicile does enlarge the husband's powers over the wife's property, this will apply only to property acquired by her subsequent to the change, and will not divest her of property which had been held by her in her own right under the law of the matrimonial domicile." By the phrase "matrimonial domicile" in this passage is meant the domicile of the husband at the time of the marriage, or the domicile adopted by the spouses immediately after the date of the marriage, and in their view when it was contracted. The authorities quoted by his Lordship—viz., Westlake, p. 67; 1 Burge, 626; Savigny, § 396; Wharton, § 198; Story, § 187; Bishop on the Law of Married Women, vol. ii. § 565, and the American cases cited there—would probably be sufficient to determine the decision of any case that may occur in Scotland. In questions of succession, the law of the domicile at the time when the succession opens will settle English and Scotch cases (*Hog v. Lashley*, 1804, 1 Robertson Sc. App. c. 4; Westlake, p. 69; Fraser, p. 1325).

It was determined by the Civil Tribunal of Albi (*Noireterre v. Griffiths and others*, 2nd Nov. 1881) that when, on the death of one of the spouses in France, the succession to her estate opened in France, the law of France would interpret for itself an antenuptial contract of marriage which had been executed in the English form; and that, the life interest allowed by the deed to the wife of her estate being inconsistent with the existence of a title in trustees, that title must be held, as it would be in French law, to be fictitious, and the succession

to the estate determined on the footing that it had belonged to the deceiver, and was independent of the provisions of the marriage contract.]

(8.) DONATIONS BETWEEN THE SPOUSES.

§ 97.

The prohibition of the Roman law against donations between spouses is to be regarded as a true instance of incapacity in a certain sphere, and must therefore be ruled by the law of the place in which the spouses had their domicile at the time of the donation.<sup>1</sup> If such a prohibition exists according to the *lex rei sitæ* it is not to be applied to married persons domiciled in another country, for this reason, that this prohibition exists for the purpose of maintaining the moral integrity of the married state, and that can certainly not be matter of concern to any Government other than that to which the persons of the spouses belong.<sup>2</sup> If, then, to take an instance, a married couple domiciled in Vienna, where donation is not prohibited, make one to the other a donation of an immoveable estate,<sup>3</sup> which lies in some country where Roman law is observed, this donation is good, and conversely it is null if the immoveable estate lies in Vienna, while the domicile of the marriage is in Hannover, where Roman law prevails.

The explanation of the difference in the theory of many of the older authorities, to which, too, some of the more modern writers have attached themselves, is that, as Argentæus correctly says,<sup>4</sup> they confuse this prohibition of donations between spouses,—a provision of the Roman law,—with the rights

<sup>1</sup> Savigny, § 379 ; Guthrie, p. 297 ; Bouhier, chap. xii. No. 95 ; Demangeat on Fœlix, i. p. 247.

<sup>2</sup> Burgundus, i. 38 ; Barthol. in L. 1, C. 6, S. Trin. No. 32 ; Bouhier, chap. 29, No. 37 ; Wächter, ii. p. 199 ; Holzschuher, i. p. 85 ; Unger, i. p. 93 ; Walter, § 42 ; Demangeat in his note to Fœlix, i. p. 123, and the judgment of the Cour Impériale de Paris, 6th Feb. 1856, cited there.

<sup>3</sup> By the 1246th article of the Austrian Code, donations between spouses are permitted.

<sup>4</sup> Nos. 8, 14, 15 ; Burgundus, as cited ; Boullenois, i. pp. 105-06 ; Abraham a Wesel, ad nit. Ultraj. No. 14 *et seq.*

of the next heirs, which are founded on principles of Germanic law; the protection given to these rights is often described in particular systems of law as a prohibition of donations. But the touchstone of the distinction is this, that the donation of the Roman law, if it is not recalled, is confirmed by the death of the giver,<sup>5</sup> and is quite admissible before marriage, while the prohibition of the German law makes any donation, even *mortis causa*, invalid, and invalid even if made before celebration of the marriage, *e.g.* between persons betrothed. The views of these older writers are, therefore, in relation to the statutes which were before them, quite correct in their results,<sup>6</sup> while the theory by which all possible benefactions<sup>7</sup> from the one spouse to the other are subjected to the *lex domicilii*, leaves out of account the prohibitions of Germanic law, which are entirely different.

The question, too, as to whether spouses can alter existing contracts of marriage after they are married, or can substitute contract for common law provisions to regulate their property,<sup>8</sup> is to be settled by the law of the domicile of the spouses at the time of the alteration in question. We have in this case to deal with a true incapacity to act,<sup>9</sup> just as in

<sup>5</sup> L. 32, §§ 3, 4; L. 27, D. 24, 1.

<sup>6</sup> There are in favour of the *lex rei sitæ*: P. Voet, iv. 2, § 2; J. Voet in Dig. 24, 1, § 19 (J. Voet for this reason, that the prohibition simply affects things without touching upon the personal qualities of the spouses); Cocceji, De fund. vii. 19; Christianæus, Comm. ad leg. municip. Mechlin. tit. xvii. act. 3, No. 12; Ricci, Entw. pp. 547-48; Burge, i. p. 639, ii. 846; Fœlix, i. § 60, p. 123; Rocco, pp. 14-27 (according to the citation in Fœlix, *ad fin.*). For the practice of the French Parliament, which had in view that prohibition of German law, and pronounced it to be real, see Bouhier, chap. xxvii. No. 32, 45-47; Boullenois, i. p. 489-91, ii. p. 97 *et seq.* 104-05, 127, 154-55; the provision of the Code Civil, art. 1091, proceeds upon the view of the Roman law.

<sup>7</sup> So, too, the modern German authorities. See Savigny, as cited.

<sup>8</sup> Demangeat, as cited; J. Voet, 23, 2, § 37; Bouhier, chap. xxii. No. 95, Cf. Code Civil, art. 1394: "*Toutes conventions matrimoniales seront rédigées avant le mariage par acte devant notaires.*" 1395: "*Elles ne peuvent recevoir aucun changement après la célébration du mariage.*" Fœlix is of a different opinion; see, too, report of a judgment of the Cour d'Appel de Limoges, 8th Aug. 1809; Sirey, ix. 2, p. 386.

<sup>9</sup> Cf. what was said (*supra*, § 44) as to incapacity to act.

the case of the prohibitions against alienating the *fundus dotalis*.<sup>10</sup>

(ε.) CONTRACTS AFFECTING THE PROPERTY OF THE SPOUSES.

§ 98.

It is the prevailing opinion that the import of the marriage contract (*pactum nuptiale*), which determines the rights of property between the spouses, should be settled by the law of the domicile of the husband at the celebration of the marriage.<sup>1</sup> In so far as this is an expression of an opinion that the place where the contract was concluded does not regulate its interpretation by virtue of the *lex loci actus*,<sup>2</sup> we must undoubtedly agree with it, since, in the case of a contract of marriage, *bona fides* does not require the parties to subject themselves to the *lex loci actus*. (Cf. *supra*, pp. 268-70.) The same may be said of the obligation of the husband to repay the *dos* which he receives.

The independent obligations of third persons,<sup>3</sup> however, and the obligations undertaken by the future wife before her marriage, can only be determined by the law of their respective domiciles; in the case of the wife, because it is only after celebration of the marriage that the wife follows her

<sup>10</sup> Bouhier, chap. xx. No. 150.

<sup>1</sup> Bartholomæus de Salic, in leg. 1, C. de S. Trin. No. 5. Jason Mayerus in leg. 1. C. de S. Trin. No. 24; Molinæus in leg. 1. C. de S. Trin.; Duplessis, Consult. 17; Œuvres, ii. p. 93 *et. seq.*; P. Voet, 9, 2, No. 5; Huber, § 10; Hert, iv. 39; Argentæus, No. 31, 45; Rodenburg, ii. p. 2, c. 4, § 1; J. Voet, 23, 4, § 29; Cocceji, Defund. vii. 12; Abraham a Wesel, de Comm. bon. Soc. i., No. 100; Massé, No. 161, p. 224; Boullenois, i., p. 637 *et. seq.*; Wächter, ii. p. 47. Cf. L. 65, D. de judiciis.

<sup>2</sup> Hammel, Repts. vol. vii. obs. 409, No. 12; Gand, No. 648 *et. seq.*, favour the *lex loci actus*.

<sup>3</sup> Cf. Alderan Mascardas, Concl. 7, No. 57, 65-6. *E.g.* according to the 1547th article of the Code Civil, any one who gives a *dos* is by common Roman law bound only to make it good in case of eviction under certain circumstances (L. 1. C. de jure dot. 5, 12; Arndt's Pandects, § 403). A native of the town of Hanover, who promises a *dos* to a Frenchman or an inhabitant of the Prussian Rhine Province, is only bound to warrant against taxes on the conditions of the Roman law.



husband ; before this, the position of husband and wife as contracting parties is equal.<sup>4</sup>

Marriage contracts are, upon the whole, to be dealt with like other obligatory contracts.<sup>5</sup> From this it follows that the interpretation of doubtful expressions must, as a general rule, be taken in the sense which the law of the place of the execution of the contract attaches to them.<sup>6</sup> If the *lex rei sitæ* requires a special form to constitute a real right which it is undertaken to grant in a marriage contract—*e.g.*, the registration in a public register—the right in question can only be acquired by observing this form, although a personal action for the right so promised may be brought upon the contract directly.<sup>7</sup>

Some doubt is created by supposing a case where the husband immediately after the celebration of the marriage changes his domicile,<sup>8</sup> and settles, we shall suppose, at what was the domicile of his wife. The law of the new domicile must rule, although in the general case it is the actual domicile, and not one which is yet to be acquired, which must decide ; we justify the exception by the consideration that the contract has for its subject a permanent relation which will continue to subsist in every sense in the new domicile, and that the law of any country as to marriage contracts cannot be applied to marriages which are not to be carried out there at all ; this holds in cases where the intention of taking

<sup>4</sup> Gand, No. 671.

<sup>5</sup> See above, §§ 66, 81. In exceptional cases, then, the *lex rei sitæ* may be applied, but only if the contract makes special provisions for particular parcels of real property.

<sup>6</sup> For instance, the expressions "heirs of the body," "issue," used in an English contract running in the English language. Cf. Story, §§ 276, 113. The *exceptio non numeratæ dotis* must, as a rule, be governed by the law of the place where the discharge is granted. See above, § 77.

<sup>7</sup> Argentræus, Nos. 38, 39 ; Burge, i. p. 368 ; Story, § 184. There is no doubt that a community of goods depending on contract will include foreign real property (see Story, § 184 ; Rodenburg, iii., p. 1, c. 4, § 5 ; Boullenois, i. pp. 794, 795), except in cases where the real right sought to be conferred is declared by the *lex rei sitæ* to be inadmissible (*e.g.*, *Dominium pro diviso* in an estate which the lawsays shall not be divided), or the disposition itself in the contract contradicts this, and proposes to treat the subject in question as a separate estate. (The usual expression, "prohibitive statute," is not apt, see *supra*, § 33.)

<sup>8</sup> Cf. Pothier de la commun anté, No. 15, 16.

up the new domicile was announced at the time of the execution of the marriage contract,<sup>9</sup> and where there can be, in the circumstances, no inference of any intention to come under the provisions of the law of the former domicile.<sup>10</sup>

(7.) DISSOLUTION OF THE MARRIAGE.—SECOND MARRIAGE.—  
SUCCESSION OF THE SPOUSES.

§ 99.

Except in so far as the *lex rei sitæ* prevails,<sup>1</sup> the law of the first domicile of the marriage will settle what rights the surviving spouse has in the property of the deceased or in the goods falling under the *communio* after the death of the predecessor; provided, that is to say, that they are the immediate results of the law applicable to the property of the spouses during the subsistence of the marriage;<sup>2</sup> if, for instance, where there has been a *communio*<sup>3</sup> *bonorum*, the property hitherto held in common falls in whole or in part to the surviving husband, or the wife retains the management and life-rent enjoyment of all the property of the spouses after her husband's death.<sup>4</sup> Both of these are results of the disappearance of one partner in the society that existed, in the latter case of the partner who had the whole right of

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<sup>9</sup> To appeal to the law of the new domicile without previously announcing the purpose of acquiring it, is inconsistent with *bona fides*. The view that the new domicile must always decide puts the rights of the wife entirely at the mercy of the husband's caprice. See Duplessis as cited, p. 96.

<sup>10</sup> *E.g.*, where the spouses propose to emigrate to a country foreign to both of them, with whose law they are unacquainted. It is different if the husband goes to the place where the wife is already domiciled. [Cf. case of Noireterre cited *supra*, § 96, p. 403.]

<sup>1</sup> See, for instance, Stephen, ii. p. 403, on the Courtesy of England. [See *ante*, p. 393.]

<sup>2</sup> Chopin, ad. leg. Andegav, iii. 2, No. 16; Rodenburg, iv. p. 2, c. 2, § 8; Burgundus, ii. 13, 14; Savigny, § 379; Guthrie, p. 298; Beseler, ii. p. 385; cf. Puchta Lectures, § 113.

<sup>3</sup> Ordinance of Lippe, 1786, § 15, cf. §§ 8, 9, 6, 7; Kraut, § 200, No. 3, 201, No. 1, 202, No. 6; Hamburger Stadtrecht, iii. 3, 8, cf. ii. § 1; Kraut, § 202, No. 15, 201, No. 1, 3.

<sup>4</sup> Nürnberg Reform, Tit. 33, Geo. 5 (Kraut, § 212, No. 14); Frankfurter Ref. v. 4, § 3 (Kraut, § 205, No. 1).

management.<sup>5</sup> Ordinary cases of succession are determined, when the *lex rei sitæ* does not assert itself, by the law of the last domicile acquired by the deceased.<sup>6</sup>

Since divorce and its consequences can only be decreed by the court of the last domicile of the parties, the consequences of a dissolution of marriage, in so far as they are penal, can only be determined by the same law. That is, for instance, true of the purely arbitrary punishments of the Roman law, which have no necessary connection with the Roman law of dowry.<sup>7</sup> For other purposes the law which regulates the relations of the spouses in other matters of property is decisive.

The effect of a second marriage in the same way, in so far as the *lex rei sitæ* does not interfere and assert its claim, or the question does not become one as to property inherited from the predeceasing spouse, is to be ruled by the law of the original domicile of that marriage; but in so far as the law gives the children of the first marriage the right to require payment or security for payment of what the surviving spouse inherited from the predecessor, all questions must be settled by the law under which the children acquired these rights; in this way, the question as to whether a *dos* or *donatio propter nuptias* of the Roman law falls to the children will be settled by the law of the original domicile of the first marriage; but on the other hand, the question as to whether the property passing by inheritance from the deceased spouse to the *parens binubus* is to be refunded on his or her marriage, must be settled by

<sup>5</sup> Many systems of law provide that the wife cannot renounce the community of goods and relieve herself of the debts that have attached thereto during the subsistence of the marriage, except by fulfilling certain conditions. These conditions, unless they are a mere form for declaring intention, in which case the rule *locus regit actum* is applicable, must be fulfilled in conformity with the law which decides generally as to the *communio bonorum*. (E.g., the wife must give up an inventory according to the law of the first domicile). Cf. Bouhier, chap. 28, No. 67, 76.

<sup>6</sup> Cf. for instance a Statute of Hannover in 1303 (Leonhard, Statutes and Customs of the City of Hannover, p. 38; Kraut, § 250, No. 15), or the "quart" of the needy widow provided by Roman law. [Cf. *ante*, p. 403.]

<sup>7</sup> See Arndt's Pandects, § 416. The opposite is assumed in a judgment of the Supreme Court at Berlin, 31st May, 1841 (Decisions, 10, p. 181); cf., too, judgment of the same Court reported in note 8.

the law of the last domicile of the *parens prædefunctus*.<sup>8</sup> For although it is true that the children of the first marriage do not claim the goods that have fallen to the *parens binubus* on the footing of intestacy,<sup>9</sup> it is also true that this *parens binubus* has only been allowed to acquire these on the understanding that he shall not marry again, and again the obvious end of all such provisions—viz., to protect the children of the first marriage against the new spouse and the children, if there shall be any, of the second marriage<sup>10</sup>—demands that the law of the domicile afterwards acquired by the *parens binubus* shall be excluded, to the end that the rights of the children shall not be left to depend entirely upon the pleasure of that parent. Whether the second spouse can take anything by succession is, on the other hand, dependent upon the law which governs the succession to the estate of the *parens binubus*, and therefore in certain circumstances upon the *lex rei sitæ*.<sup>11</sup>

<sup>8</sup> Or by the *lex rei sitæ*, if this is the law that rules the intestate succession of the predeceasing spouse.

<sup>9</sup> A judgment of the Supreme Court at Berlin, 3rd May, 1853 (Decisions, 25, p. 373), makes the law of the place where the second marriage took place decisive; for the penalties upon a second marriage do not depend upon general principles of law, but upon considerations of morality, expediency, or convenience. No doubt there is much to be said for the view which regards it as a case of intestacy resting upon a tacit assumption as to what the predeceasing would have wished, and consequently a resolute condition by virtue of which the advantages which the survivor has enjoyed are lost by entering into a second marriage. At variance with this, however, is L. 5, § 1, C. de sec. nupt., 5, 9, which provides that children shall have a claim upon the *lucra nuptialia*, if they have not succeeded to the estate of the *parens prædefunctus*, and shall lose the right if they are ungrateful to the *parens binubus*; see also No. 22, c. 1, and c. 46, whereby Justinian's law is not to apply to persons married before the date of the law. This judgment was pronounced upon a claim by children of a first marriage to property which the *mater binuba* had inherited from her first husband. Justinian's provisions are so arbitrary that no argument can be drawn from the transitory provisions in No. 22, c. 1, and c. 46.

<sup>10</sup> Cf. Seuffert, Comment. i. p. 243.

<sup>11</sup> Abraham a Wesel, ad No. const. Ultraj. art. 10, § 138; J. Voet, in Dig., 23, 2, § 136; Boullenois, i. pp. 806-9; and Bouhier, chap. 34, No. 41, declare in favour of the *lex rei sitæ*.

[The French courts have held that an English marriage-contract must be read according to the rules of French law, *quoad* its testamentary provisions,

The law of the domicile of the new spouse must decide exclusively as to the rights which children have in his or her property.<sup>12</sup> The limitations imposed in cases of intestacy, and upon the dispositive power of a testator, —whereby, for instance, one spouse cannot, where there are children, give by his last will more than a certain proportion to the other—are, as a rule, to be determined by the law which governs the succession in question.<sup>13</sup> In this way we can account for the fact that the older writers, who touch this question, and have, as a rule, the purely German institution of the rights of the next heirs in view, apply the *lex rei sitæ*.<sup>14</sup>

## B. BETROTHAL.

### § 100.

It results, from the same reasons which are cited to support the doctrine that questions as regards the marriage are to be settled by the law of the husband's domicile, that questions as to betrothal—by which the wife is not yet subjected to the law of the husband's domicile, and in

if the succession opens in France (Noireterre, *ut supra*, § 96, p. 403); and that, in order to ascertain whether a husband has, in settling provisions on his wife, exceeded the one-fourth part of his estate, which is the limit of this provision by French law, no account can be taken of real estate abroad (Leroy de Chaumont, *ut supra*, § 94, p. 395).]

<sup>12</sup> For instance, by the law of Hamburg, children of the first marriage have in their step-parent a guardian who is charged by law with their aliment and upbringing. Baumeister, Hamburg, Privatr. ii. p. 144. This is not the case according to the common law of Rome.

<sup>13</sup> Boullenois, i. pp. 564-9; Savigny, § 379; Guthrie, p. 298.

<sup>14</sup> Argentræus, No. 8 (this writer correctly notes that foreign real estate is not computed in reckoning the *tertia pars* which the *Contumes* of Bretagne allow one spouse to give to the other); Rodenburg, ii. c. 5, § 1; Hert. iv. 43; Ziegler, Dicast. Concl. 15, No. 21; J. Voet, in Dig. 23, 2, § 85; Moli-næus, ad Leg. i. C. de S. Trin; Stockmans, Dec. 25, No. 10; Cochin, Œuvres, v. p. 80; Petr. Peckins, de Testament Conjug. ii. c. 28, No. 5; Hofæker, de eff. § 28; Jason Maynus, in L. i. C. de S. Trin. No. 10, have the Roman law of succession in view, and pronounce generally in favour of the *lex domicilii*.

which both parties meet with equal rights—must be determined by the law of the domicile of both parties.<sup>1</sup>

The rule, "*locus regit actum*," is only applicable to the form of the betrothal; and it is obvious that a judge must dismiss an action proceeding upon a betrothal which the law to which he is subject pronounces to be immoral.<sup>2</sup> But it is not generally true that a betrothal is ruled by the law of the place where action is brought.<sup>3</sup> This is a result of the coercitive character which laws applicable to these questions possess. The rule, "*locus regit actum*," cannot but be applied to cases of betrothal, unless the utmost violence is to be done to good faith and honour.<sup>4</sup>

<sup>1</sup> In the case of a true conflict of law, the decision must be in favour of the defender—*e.g.*, a betrothal is invalid by the law of the bridegroom's domicile, but valid by that of the bride; an action brought by either of them upon the betrothal must be dismissed. See Duplessis, Consult. 20 (*Œuvres*, ii. p. 115). Cf. judgment of the Supreme Court at Stuttgart, 28th June, 1853 (Seuffert, 6, p. 430):—"By the provisions of the rules of the Matrimonial Court of Würtemberg, a valid betrothal can only be annulled by the sentence of the Matrimonial Court. This provision is a law of a positively coercitive character, resting upon grounds of morality; and a defender who, as a subject of Würtemberg, is subject to its laws, cannot withdraw herself from their operation by entering into the contract of betrothal with a foreigner in a foreign country, although she is to carry it out there."

<sup>2</sup> *E.g.*, by art. 45 of the General Code of Austria.

<sup>3</sup> Unger, p. 192.

<sup>4</sup> A judgment of the Supreme Court of Celle, 3rd February, 1846 (Seuffert, 6, p. 161), proceeds upon the opposite view. (The ordinance as to betrothals in the Hanoverian dukedom of Calenberg, of 5th January, 1733, provides that it shall be essential, before entering on a betrothal, to obtain the consent of the parents, grand-parents, or curators on both sides, and that the betrothal shall be contracted in the presence of two persons of credit, and of the clergyman of the place when the betrothal takes place in the country.) The judgment quoted lays down that the legality of a betrothal between persons settled in the dukedom of Calenberg is to be determined by that ordinance, even in cases where it is entered into in a foreign country, or the marriage is to subsist in a foreign country. See, on the other hand, a judgment of the Supreme Court at Wolfenbüttel, of 8th March, 1858 (*Zeitschrift für Rechtspflege im Herzogth, Braunschweig*, 1859, No. 2, p. 28, which applies the rule, "*locus regit actum*," to a contract of betrothal concluded abroad between a native of Brunswick and a foreign woman, although, by the law of Brunswick, there are special forms of betrothal appointed which had not been observed in the case in question, forms which cannot be omitted without rendering

It is only the courts of the State to which the defender belongs that are competent to decide questions as to betrothals.<sup>5</sup> This is a consequence of the fact, if we are to judge of betrothals by the analogy of other obligatory contracts, that we are here concerned with a contract which proposes to establish a permanent personal relation, and in which, therefore, except as regards the form, the application of the *lex loci actus* is not required.<sup>6</sup>

### C. RELATIONS OF PARENTS AND CHILDREN.

#### § 101.

The purely personal relations between parents and lawful children are to be ruled by the *lex domicilii* of the parties, in the same way as the personal relations of the spouses, and under the same limitation—that no one can in any country claim rights which are there held to be immoral or indecent.<sup>1, 2</sup>

#### *Note P, on § 101.*

[In England the extent of the authority of a foreign parent over his child is the same as that of an English

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the parties liable to punishment. The judgment of the inferior court at Wolfenbüttel had held the law of Brunswick to be an enactment of a positive and coercitive character, which followed subjects of that State into foreign countries as personal statutes.

<sup>5</sup> See *infra*, § 185.

<sup>6</sup> To a different effect a judgment of the Supreme Court of Appeal at Celle, 4th May, 1852, which grounded its jurisdiction solely upon the fact that the betrothal took place within the territory of the court. The court of first instance, the Consistorium at Hanover, had declared itself incompetent.

<sup>1</sup> *E.g.*, the right of parents to inflict punishment. Wächter, ii. p. 188.

<sup>2</sup> Argentræus, No. 7; Phillipps, § 24, p. 189. The actual domicile, and not that at the time of the birth of the child, determines the religious upbringing of the children; but permanent provisions of the law of a new domicile must, in cases of doubt, be observed in the new domicile as well, although the law of that new domicile may declare contracts as to the religion in which the children are to be brought up null. This is undoubtedly the case on the analogy of the temporary provisions of the ordinance of 31st July, 1826 (G. S. T. p. 174), § 10. As to the laws on this subject in different States, see Fœlix, ii. p. 504; Unger, p. 195. See Savigny, § 380; Guthrie, p. 301. The relations of master and servant follow the principles of the law of obligations.

parent (Westlake, p. 47). Boyle, L. J. C., in *Edmonstone v. Edmonstone*, 1st June, 1816, Fac. Coll. is of opinion that Scots law is the same. His Lordship refuses to admit that persons coming into the territory of a foreign State can insist on having effect given to the peculiarities of their own law. Lord Fraser, again, is of opinion (*Parent and Child*, p. 590) that the doctrine of the text is the law of Scotland.

On the other hand, it has been held by the French courts that they will, in the interests of morality, accord to a foreigner who is merely resident in France the powers conferred by the *patria potestas* upon Frenchmen; and although without the authorisation of Government he does not enjoy civil rights, he will yet be entitled to appeal to the courts to ordain a child of nineteen years of age to return to him (*Trib. Civ. de la Seine*, 3rd February, 1872). This decision seems to be rather in the direction of the English principle than in that laid down in the text and adopted by Lord Fraser, for it does not appear that in this case the father would by the law of his own country have had any such rights. The distinction between the notion of domicile with us and of nationality in French law as conferring a right of access to legal remedies, must, however, be kept in view. The father's residence may have had all the permanency of what we call domicile.]

#### D. PARENTAL AUTHORITY.

##### I. CONSTITUTION OF THIS AUTHORITY BY BIRTH OR LEGITIMATION.

#### § 102.

The law of the place in which the father of a child had his domicile at the time of the child's birth must decide all questions as to whether the child was born in wedlock, and therefore became subject to his father's authority.<sup>1</sup> The place of the marriage particularly may be set out of account.

The same law will determine the effect of the special pre-

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<sup>1</sup> Bouhier, chap. 24, No. 122; Gunther, p. 732; Walter, § 46; Gand, No. 430; Savigny, § 380; Guthrie, p. 301; Unger, p. 195; Burge, i. p. 89; Fœlix, i. § 33, p. 82.



sumptions with regard to paternity : these are not rules for convincing the judge, which would be subject to the *lex fori*,<sup>2</sup> but substantial rights of the child.<sup>3</sup> We shall give our reasons for this view in discussing the law of process ; at present we need only point out how dangerous it would be if the child were prevented from founding on the presumptions that established his legitimacy at the time of his birth, or if different judgments as to his legitimacy could be given in different countries.

If a particular form is necessary for the recognition of a bastard child, the rule "*locus regit actum*" is to be applied, in so far as the intention of recognising the child is concerned, an intention which may certainly be open to doubt in some circumstances with regard to an act which in its substance has reference to the law of the domicile of the person making recognition.<sup>4</sup>

Legitimation of bastards, either by subsequent marriage or by an Act of the Government (*Rescriptum principis*), is nothing but a legal equalisation of certain illegitimate with legitimate children. The law which rules the rights of legitimate children must therefore regulate the legitimation of bastards ; and as the former are subject to the law of the actual domicile of the father, the latter must be determined<sup>5</sup> also by the law of the domicile of the father at the date when the fact said to infer legitimation took place.<sup>6</sup>

<sup>2</sup> Burge, i. p. 88, is of another mind.

<sup>3</sup> See *infra*, § 123, as to the presumptions which regulate particular legal relations. Bouhier and Fœlix take the view of the text. Even Burge recognises that the so-called *præsumptiones juris et de jure*, such as the 314th article of the Code Civil establishes in favour of legitimacy, against which no counter-proof, however strong it may be, is admissible, are not mere regulations for the persuasion of the judge.

<sup>4</sup> Gand, No. 436. A child begotten and born in France of foreign parents can use his French *acte de naissance* to prove his legitimacy, but may also have recourse to the means of proof recognised in his own country. Fœlix as cited, and § 73 Demangeat.

<sup>5</sup> It is of no moment in what place the subsequent marriage of the parents took place. See Wheaton, § 93, p. 123, and the authorities cited *infra*.

<sup>6</sup> If the child has acquired a special domicile or nationality, legitimation cannot take place against his will (or that of his guardian) unless by the law of his special domicile he is obliged to submit to it. Gand, No. 446. It is different with regard to the mother's rights ; in this case, since proof of the

Some authorities have laid down that the time of the birth shall alone rule such questions, because by its birth the child acquires<sup>7</sup> the character which is to determine whether it can be legitimated, and if so, in what way ; or, as has been well said, because by the birth of the child there is established a legal relation between it and its father which must be governed alone by the law under which it originated.<sup>8</sup> But although the birth of a bastard may lay certain obligations upon him who has had connection with the mother before the birth, and to a certain extent therefore a legal relation is established by the birth between the child and the putative father ; yet the very meaning of an illegitimate birth is that a family relation, which is all we are now concerned with, does certainly not arise between them. Nothing can be inferred from the purely arbitrary expression "Capacity or incapacity of the child to be legitimated ;" it might as reasonably be maintained that if the law of the place where the child was born forbade marriages between cousins, and thus pronounced a child incapable of such a marriage, this child could not, in consequence of his original incapacity, contract a marriage in that degree after he had acquired a new domicile, the law of which was ignorant of the prohibition. Nor can it be urged that according to our view the father may, before entering on his marriage with the mother, choose a domicile prejudicial to the interests of the child. For on the one hand the legitimation of a child depends upon a voluntary recognition by the father,<sup>9</sup> and on the

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birth is possible, the wish of the child does not affect the leading of the proof. Gand, No. 458. [A bastard born of a foreign mother and a French father is of foreign nationality till the marriage of its parents, when its nationality becomes that of the father (Carmellini, Trib. d'Albertville, 13th March, 1879.)]

<sup>7</sup> Merlin, Questions de droit, art. Legitimation, § 1 ; Story, § 93 ; cf. Burge, i. pp. 102, 106, 107. It seems, however, that the judgments of the English Courts there cited do not at bottom rest on this consideration, but upon the circumstance to be illustrated, *infra*, note 13. The decision of the Cour de Caen, 18th Nov. 1852, reported by Demangeat on Fœlix, i. p. 82, note d, that a child begotten by an Englishman in England upon a French woman cannot be legitimated by the subsequent marriage of its parents does not contradict our view ; it would not be at variance with our theory unless the Englishman had been subsequently naturalised in France.

<sup>8</sup> Schäffner, pp. 50, 51.

<sup>9</sup> Savigny, § 380 ; Guthrie, p. 302. ¶

other, if a recognition of the child made at a former domicile really confers a right upon it conditional upon the subsequent marriage, then this right is not lost by a change of domicile ;<sup>10</sup>

<sup>10</sup> It is not quite accurate to say that the domicile of the father at the time of the marriage decides (Savigny as cited ; Walter, § 45 ; Unger, i. p. 197). The decision given by Schäffner, p. 51-2, may be reconciled with the view taken here, but not with the view which takes as decisive the domicile at the time of the marriage. The child may, according to our view, plead the law of that domicile among many successive domiciles of the father which is most favourable to him. But the fact of birth in itself does not establish any family relation between the bastard and the father. Savigny says in reference to the Prussian A. L. R. § 380, note 1 : "The Prussian law indeed regards mere proof of intercourse within a certain time before the birth as itself proof of paternity ; yet in legitimation by marriage it makes the rights of legitimacy begin from the nuptial ceremony. Hence, according to the sense of the Landrecht, legitimation has no place if the father before marriage transfers his domicile into a country where the common law prevails and then refuses to recognise the child."

[The Law of Scotland holds that the domicile of the father at the time of the marriage is the important consideration in determining the legal effect of that marriage upon the status of the children of the persons married (Fraser, Parent and Child, p. 52, and cases quoted there). The case of a birth taking place while the domicile of the putative father was in a country whose law forbade legitimation *per subsequens matrimonium*, while his marriage with the mother took place at a time when his domicile was in a country whose law allowed such legitimation, has not yet occurred in Scottish law ; the domicile at the date of the birth has never been in conflict with that at the date of the marriage, but the judges in Munro's case, 7 Cl. and Fin. p. 842, all held the view that if such a case should occur the law of the domicile at the date of the marriage must rule. Lord Brougham, in giving judgment in that case in the House of Lords, and enunciating principles applicable in England as well as in Scotland, says : "If the domicile were not the same for both parents at these two periods, we should hold that that of the father at the time of the marriage should give the rule."

Lord Hatherley, however, in a subsequent case (*Udny v. Udny*, 1869, L. R. 1, S. and D. A. 447) makes the law of the country in which the father is domiciled at the date of the birth give the rule ; his lordship bases this opinion upon the view attacked by the author—viz., the capacity for legitimation attaching to the child at that date.

As regards succession to real estate, the law of England is correctly stated in the text ; that of Scotland will allow one legitimate by the law of his domicile, unless that character be derived from a union considered incestuous by Scots law, to inherit real estate in Scotland.

The French courts have held that the place of the marriage matters not, and that an English marriage will be sufficient to legitimate the children of a French father and an English mother (*Courban v. Verrières*, C. de Bourdeaux,

for although it may be that the law of the new domicile will not give to a recognition in its own territory the meaning which is desired to be attached to it, it will never withdraw from a recognition made in the territory of another law the effect which belongs to it.

The effect of legitimation in accordance with the law of the domicile must extend to questions of succession to immoveables situated abroad,<sup>11</sup> in so far as these depend upon the recognition of the child as legitimate.<sup>12</sup> The judgments of the English courts<sup>13</sup> differ from this, and

27th Aug. 1877). On the question as to the form of legitimation—*i.e.*, whether there must, previously to the marriage, be a recognition in the French form of the paternity of the children, or a formal recognition of some kind—the French courts have differed; the Court of Besançon on Appeal (*Balmiger v. Dutailly*, 25th July, 1876) determined that in the case of children born of French parents in California, where the marriage afterwards took place, no previous recognition was required, the fact of the children having lived in family with their parents being sufficient evidence of paternity, which is the object of requiring a formal recognition; the question of the status of the children was held to be a personal law, and need not therefore be referred to the determination of the law of the country in which they were claiming succession; such children were therefore held entitled to succeed to estate, real and personal, belonging to a succession that had opened in France, and was therefore being administered according to French law. The Court of Paris, on the other hand, held (*Chevrillon v. Héritiers Méchain*, 2d Aug. 1876) that bastards if legitimated abroad could only be legitimated according to French law, and that the fact of their being children of their reputed father could only be proved in the way directed by French law—*viz.*, by a declaration previous to the marriage, no equivalents being sufficient. The peculiarity of the French rule of evidence as to the paternity of a child, which does not permit that relation to be established save by the confession of the father, leads to these difficulties, and it is on the ground that any infraction of this rule would be *contra bonos mores* that the decision of the Court of Paris proceeds.]

<sup>11</sup> Schäffner, p. 53; Bouhier, chap. 24, No. 123; Gunther, p. 732; Hommel, *Rhaps. Quæst. ii. obs.* 409, No. 3; Hert, iv. 14; Boullenois, i. pp. 62-3, 130-31.

<sup>12</sup> Story, § 87a, and Lord Brougham (Story, § 93p) pronounces in the same sense. See judgment of the Supreme Court of Appeal at Oldenburg, 5th March, 1853 (Seuffert, vi. 433-34): "The law applicable at the time of the birth or legitimation, as the case may be, decides what children are to be held legitimate or validly legitimated. But in succession the law of the domicile of the deceased determines the rights of legitimated as well as of legitimate children."

<sup>13</sup> Burge, i. p. 109, approves of these judgments: "The personal quality or status of the person, if it constitutes his title to succeed to real property, must be that which the *lex loci vel rei sitæ* has prescribed."

require in order to found a claim to succession in immoveables that the child should be held legitimate by the law of the place where the estate lies, and that in spite of the fact that they have approved of the view whereby a child, illegitimate by the law of its domicile, is held incapable of making any claim of succession to immoveables, whatever the law of the place where these are situated may be.<sup>14</sup> These judgments may be explained in this manner:—The law of England does not give legitimate children action against their father for recognition: the illegitimate child recognised by his father has the same rights against him that a legitimate child has,<sup>15</sup> and the legitimacy of a child which the father has recognised is only questioned as a prejudicial point in claims of succession. The exclusion of children begotten out of wedlock, who have been recognised by the father, does not then depend upon the legal uncertainty as to their birth,—which can only be removed by legitimation, as is the case in modern Roman law,—but upon an incomplete incapacity attributed to bastards,<sup>16</sup> such as we often find in older German law and in many feudal systems. Now since a foreigner has no greater or more complete capacity than an Englishman, he is not entitled to acquire landed property in England, where feudal principles regulate all questions of title to land, any more than he would be entitled in his own country, supposing the same principles of feudal law to prevail there, to claim succession to feu rights, even although he had obtained a grant of legitimacy from the Crown, which would apply to all other legal relations.<sup>17</sup> The

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<sup>14</sup> Story, 87*a*.

<sup>15</sup> Burge, i. p. 90; Blackstone, i. 451; Stephen, ii. 299. The bastard is counted a *filius nullius* in questions of succession to moveables also; but the Crown can grant special privileges, Stephen, ii. 300.

<sup>16</sup> The exception which the law of England makes in the case of a bastard *puis né* can only be referred to equitable principles.

<sup>17</sup> See *supra*, § 27, principles of legal capacity. The grounds assigned in England for this decision do not justify it, as Lord Brougham has shown. In particular, the words of the statute of Merton, which have to be considered, by which there is required birth "in lawful wedlock," merely require legitimacy; nor can we allow an appeal to the fact that we have to deal with a prohibitive statute, since, as is well known, there are prohibitive statutes which without any dispute are counted as personal statutes. Molinæus, *ad*

fact that one who is pronounced incapable by his own *lex domicilii* cannot succeed *ab intestato* to land in England, whatever the law of England might say as to his capacity, is explained by observing that in such a case the *lex domicilii* denies the relationship of the deceased to the successor, and that relationship must be determined by the *lex domicilii*, and constitutes by the law of England a necessary condition of a claim of succession in immoveables.

The imperfect incapacity which attached to bastard children in the Middle Ages, and subsequently down to more modern times to many effects, accounts for the theory of the older writers, by which they sought to confine the effect of legitimation given by a *rescriptum principis* to the territory of the sovereign conferring it<sup>18</sup>—especially, too, as the sole result of legitimation, even in the territory of the sovereign who bestowed it, was in many cases merely to withdraw the estate of the person so legitimated upon his death from the grasp of the sovereign, and to leave it to the relatives of the person legitimated by suspending the old German rule of law, which forbade bastards either to succeed or, to a certain extent, to leave a succession.<sup>19</sup> In view of the import now attaching to legitimation, if, as is the case now-a-days in most territorial systems, illegitimacy no longer works any diminution of legal capacity, while legitimacy merely gives the concrete rights which depend on relationship, it cannot be represented, in discussing the effect of legitimation *per rescriptum* on the right of succession to foreign heritable

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Consult. Paris, § 8, gl. 1, Nos. 36-46, gives a decision similar to the English decision, and Bouhier, chap. 24, No. 123, also, in the case of a statute calling only children "*nés en loyal mariage*" to the succession.

<sup>18</sup> Alb. Brun. De Statut. art. xiii. § 51. "*Et ideo differt legitimatus a legitimo tanquam imago ab eo cujus imaginem representat. Et propterea Salycetus dixit quod legitimatio non facit esse essentialiter legitimam.*" Bald Ubald in L. 1, C. de S. Trin. No. 75 ; Chassenæus in Consult. Burgund. Rubr. ix. in tit des mains morter. verb. va demeurer, Nos. 17, 18 ; P. Voet, iv. 3, § 15 ; Argentræus, No. 20 ; J. Voet, de stat. § 7 ; Bartol. ad L. 1, C. de S. Trin. Alef. No. 59 ; Cocceji, De fund. v. §§ 7, 8 ; Boullenois, i. p. 64 ; cf. Bouhier, chap. 24, No. 129.

<sup>19</sup> Chassenæus, l. c. Rubr. viii. in tit. Des successions de bastards, verb. ab intest. Nos. 32, 41, 250 ; Mynsinger, Observ. Cent. iii. obs. 26, Nos. 7, 8, 11 ; Gerber, D. Pr. R. § 39.

property,<sup>20</sup> that the sovereign is dealing with estate which lies beyond his territory :<sup>21</sup> as we hold a foreigner to be a bastard, if he is so by the law of his domicile, we must also hold him to be legitimate if the law of his domicile declares him to be so.<sup>22</sup> On the other hand, legitimation given in a country of which the father is not a subject does not bestow any rights of relationship as against him.<sup>23</sup> If the child has a different domicile from the father, legitimation in order to give the latter rights against his child must be competent by the law of the country to which the child is subject.<sup>24</sup> But this condition is no longer necessary if the child (with leave of its guardians) goes to the domicile of the father.

## II. ADOPTION AND ARROGATION.

### § 103.

The same principles will rule the constitution of paternal authority by means of adoption and arrogation,<sup>1</sup> and also emancipation,<sup>2</sup> or the discharge of that authority : the rule "*locus regit actum*" must, however, be applied in this case in

<sup>20</sup> Except in feudal law, Cf. Gerber, § 110.

<sup>21</sup> Several of the authors cited in note 16 take this ground.

<sup>22</sup> Schäffner, p. 55 ; Wening Ingenheim, § 22 ; Mühlenbruch, § 72 ; Gunther, p. 732 ; Hommel. Rhaps. Quæst. ii. obs. 409, No. 3, Supreme Court of Appeal at Kiel, 2nd February, 1853 (Seuffert, 7, p. 399). "The legal effect of legitimation bestowed by a foreign sovereign extends to estate of a deceased person situated abroad." One who by a *rescriptum principis* is legitimated in his own domicile must, therefore, be held to be legitimate in France, although the Code Civil does not recognise emancipation *per rescriptum* (cf. Code Civil, arts. 331-33 ; Zacharia Civilrecht, iii. § 370).

<sup>23</sup> Judgment of the Cour d'Appel of Paris, 11th February, 1808 (Sirey, 8, 2, p. 86). Such a legitimation no doubt confers complete legal capacity for all legal relations pertaining to the territory of the sovereign conferring it, if the bastard has an incomplete capacity there.

<sup>24</sup> See *supra*, note 6.

<sup>1</sup> See foregoing section, note 22, and section 5, note 2, as to the question in what state sanction must be obtained. The actual domicile, and not that which the father had at the time of the birth of the child, rules.

<sup>2</sup> Merlin, Rép. Puissance Paternelle, vii. § 1 ; Boullenois, ii. p. 31, are of a different opinion. Boullenois himself recognises the difficulties that may arise from this rule (§§ 35-6) ; if, for instance, there are several children in existence, the younger brother might thus be emancipated before the elder.

so far as the form of any declaration is concerned. (Cf. however, § 102, note 4).<sup>3</sup> Unless it is expressly prohibited by statute it must be held competent to adopt a foreigner or to be adopted by a foreigner.<sup>4</sup> A daughter is always emancipated by marriage, since the wife follows her husband's domicile, if the law of the new domicile makes the paternal power cease upon that event.<sup>5</sup>

### III. RIGHTS OF THE FATHER IN THE PROPERTY OF HIS CHILDREN.

#### § 104.

The rights of the father in the property of his children are to be determined by the same principles<sup>1</sup> which decide whether and to what extent the *lex domicilii* or the *lex rei sitæ* is to regulate questions of patrimonial rights between the spouses.<sup>2</sup> According to older German law, which was retained in various of the customary laws of France up to the time of the publication of the Code, and according to the law of England, the *lex rei sitæ* is applied in the case of immoveables, while, according to the common

<sup>3</sup> Bouhier, chap. 24, No. 86 ; Boullenois, ii. pp. 48-49 ; Merlin Rép. Puissance Pat. vii. Nos. 5-7 ; Hert, iv. 47 ; Hofæker, de eff. § 21 ; Unger, p. 195 ; Wächter, ii. p. 185, who, however (note 306), rejects the application of the rule "*locus regit actum*," probably because the prescribed permission of the authorities, which in certain circumstances may be refused, has been regarded as a form. (See *supra*, § 34). Cf. Unger as cited, note 139 ; Gand, No. 470. (The Code Civil, art. 353, requires a formal judicial "judgement").

<sup>4</sup> The contrary is laid down by many French authors and in French practice, Fœlix, i. p. 97-8 ; Gand, No. 465. See, on the other hand, Mailher de Chassat, No. 225, and Demangeat on Fœlix, i. p. 98 ; cf. what was said *supra*, § 27, as to legal capacity. [A foreigner who has a right of residence from Government may be adopted (Bétoland, C. de Paris, 30th April, 1881).]

<sup>5</sup> Wächter, ii. p. 187.

<sup>1</sup> Differences—By the law of England, the father has the administration, but not the usufruct of his son's property (Blackstone, i. p. 453 ; Stephen, ii. p. 294) ; while by common Roman law the father as a rule enjoys both.

<sup>2</sup> The *lex domicilii* alone decides whether a son is under paternal authority or not. The usufruct of the father of an Englishman in an estate situated in the territory of the common law of Rome, terminates with his 21st year, since by the law of England the authority of a father terminates then. Merlin, Rép. Puissance Paternelle, vii. § 1.



law of Rome and modern French law, the *lex domicilii* is the rule.<sup>3</sup>

The following exceptions are admitted :—

1st. The law, by which the rights of the father in the estate of the children are fixed, does not propose to settle these for all time, in the same way as the law with regard to the property of the spouses. The authority of the father, at least in modern law, is a legal relation which is terminated by his death. Besides the father's right of property does not, like the rights of the spouses, rest upon the free *consensus* of the parties interested, but upon the relation which *Jus Publicum* confers upon them. This is determined by the law of the actual domicile. Lastly, however, it cannot be the intention of the law of the new domicile to disturb rights of property which have already arisen.<sup>4</sup> On these reasons depends the correctness of the prevailing theory, which holds the law of the domicile at the time of the alleged acquisition of the right to be the rule, and not the law of the domicile which existed at the date of the child's birth.<sup>5</sup>

2nd. It is certain that, if the *lex domicilii* allows it, the father can renounce a right of usufruct which the *lex rei sitæ* bestows upon him, and under similar conditions the son may acquire a foreign estate in such manner as to exclude

<sup>3</sup> Capacity to act is also to be determined solely by the *lex domicilii*. The *lex rei sitæ* should rule, according to Merlin, Rép. Puissance Paternelle, vii. § 1. Duplessis, Consult. xv.; Œuvres, ii. p. 77; D'Aguesseau, Œuvres, iv. p. 660; Boullenois, i. p. 68; Fœlix, i. p. 121; Gand, No. 473 (who even in moveables would have the *lex rei sitæ* prevail), and also according to the practice of the English common law.

The grounds adduced by these authors do not, however, justify their theory, which is, in its result, according to the older German and English law, correct. Merlin as cited: "*La loi qui donne à un père l'usufruit des biens de son fils doit être réelle, parceque son objet est réel.*" For the general validity of the *lex domicilii*, see Seuffert, Comm. i. p. 244; Walter, § 46; Bouhier, chap. xxiv. No. 47; Mittermaier, § 30, p. 116; Wächter, ii. pp. 187-88; Unger, i. p. 195.

<sup>4</sup> To apply the law of a new domicile to property already acquired would place the rights of the children entirely at the mercy of the father. Cf. Seuffert as cited, and the authors quoted in the following note.

<sup>5</sup> Bouhier, chap. xxii. No. 17; Merlin as cited, § 2. With this the more recent decision of an English court, reported by Story, § 463a, coincides. Boullenois, ii. p. 31, pronounces in favour of the opposite view, although not without hesitation.

the usufruct of the father. This must be the case if the son acquires an estate abroad out of his own funds over which the father has no usufruct.<sup>6</sup> In like manner it must be assumed that there is a reservation of the usufruct in favour of the father, if he acquires a property with funds of the son over which he has a usufruct, and the *lex rei sitæ* can as a rule therefore be applied only to estate which the son has inherited.<sup>7</sup>

### E. DUTY OF MAINTENANCE<sup>1</sup> AND DOWERING.

#### § 105.

The obligation to maintain and to dower arising from kinship is to be decided according to the law that exists.

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<sup>6</sup> The intention of the donor or deceasing person will decide in cases of donation or bequests *mortis causa*, and this intention may no doubt be determined by the law of an earlier domicile. Older authorities propose to apply the law of the earlier domicile on account of the possibility of *dolus* on the part of the father. See Merlin as cited, No. 2.

<sup>7</sup> [A decision of the French courts has laid it down that the privilege of a *liferent* in the children's estate, given by French law, is a personal law, and therefore, if the parent claiming the *liferent* is French, it must be allowed whatever the nationality of the children may be (*Chimol v. Cohen*, 14th March, 1877) *Cour de Cassation*. In this case the children were children of an Algerian Jew and his wife; the father died, and the mother became naturalised as a Frenchwoman; she then claimed under the French law the enjoyment of her children's property, and this was allowed to her as from the date of her naturalisation, *ratione potestatis paternæ*, although her children remained of their father's nationality, and were never naturalised. The rule in England would seem to be different; see Sir L. Shadwell in *Gambier v. Gambier*, 1835, 7 Sim, 263, where a father claimed the *liferent* of his children's property. That case is not directly an authority to the contrary, for neither parent nor children were there domiciled in a country where the law would allow the claim; the judge, however, deals with the case as being a claim upon property adjudged to belong to domiciled British subjects—viz., the children; “and so long as they are domiciled in this country, their personal property must be administered according to the law of this country.” The principles of English and Scots law would forbid the recognition of any such rights over real estate unless the claim was in accordance with the *lex rei sitæ*.]

<sup>1</sup> The duty of the *stuprator* to aliment no doubt belongs to the law of obligations. We discuss it in this place, because the point is to demonstrate the difference between the provisions in question, and the legal rules of the family relations: this we could not do before discussing the law of the family.

at the domicile of the person against whom the claim is made.<sup>2</sup>

It is matter of dispute whether the obligation for aliment imposed upon the person who has had intercourse with the mother of a bastard a certain time before its birth, rests upon kinship. Although the act which may be presumed to have given life to the child cannot be held as a delict in a question with it,<sup>3</sup> and the claim which private law gives the child cannot in any sense be referred to what is to be held to be a delict against the public,<sup>4</sup> still we cannot refer the obligation for aliment to any kinship, if we consider the disadvantageous position which the unrecognised bastard occupies as compared with a lawful child, or a child recognised by its father—disadvantages which really rest upon a denial of any kinship<sup>5</sup> between the alleged progenitor<sup>6</sup> and the child.<sup>7</sup>

On the other hand, the provisions as to the duty of the person who has had intercourse to furnish aliment or to contribute thereto, may be regarded from the following point of view. The duty of alimentering the child, if the father is unable to supply aliment or to pay for it, falls on the mother, and ultimately on the State, or on the locality where the mother has her domicile. A law which binds the paramour to aliment has for its object a permanent provision for the child

<sup>2</sup> Cf. *supra*, § 102, note 6.

<sup>3</sup> See, on the other hand, Vangerow, Pandects, i. § 260. The mother's claims must be distinguished.

<sup>4</sup> Many who maintain that the claim in question has the character of a claim upon a delict, do not hold that any delict was committed against the child, but that there was a public delict, for the consequences of which—and among these is the birth of the child—the man is answerable (Puchta, Lectures, § 316). It cannot be disputed that illicit intercourse may be held to be a delict, and in many systems of law it is threatened with public punishment; but it is difficult to see how that can give rise to a claim for private rights which cannot be made by anyone except the child. We might explain by such a theory a claim on the part of the State for the maintenance of the child.

<sup>5</sup> Vangerow, as cited.

<sup>6</sup> See, on the other hand, Puchta as cited.

<sup>7</sup> It is not a fair conclusion from words occurring in a statute, to the effect that he who has intercourse must be held to be the procreator of the child (Allg. Österr. Gesetzbuch, § 163, *ad fin.*), that this statute regards kinship as the ground of the claim for aliment. (The same statute book, § 165, says: "Bastards are as a rule excluded from the rights of family and kinship.")

and the unmarried mother. Such a law then will hold good as far as may be for all bastards belonging to the State, and conversely cannot be applied to children who happen to be begotten in this country upon foreign mothers, if the law of the mother's domicile does not recognise such a provision, or, as may be the case, holds it to be harmful. For a permanent protection of individuals is the affair of the State to which they belong.<sup>8</sup> The child, therefore, can only ask aliment under the conditions required by the law of the mother's domicile, and can only require so much as the *lex domicilii* of the mother allows him,<sup>9</sup> but at the same time he can only make a demand in so far as the law of the place where the

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<sup>8</sup> It is also the view always taken in the practice of the Supreme Court at Berlin, that the law of the mother's domicile rules. See the judgment of this court, 11th April, 1856 (Decisions, 32, p. 404), 1st Nov. 1850 (Decisions, 20, p. 300), 4th Oct. 1858 (Striethorst, Archiv. N. F. Jahrg. 2, vol. i. p. 355), and the Plenarbeschluss of 21st Nov. 1849 (Decisions, 18, p. 39). The court holds the duty of maintenance, imposed upon the father, as a personal right given to the child by its birth. Holzschuher (i. pp. 79, 488) is also in accord with this view. According to Pütter (Fremdenrecht, § 59) the child cannot require more than the law of its domicile permits, and if the suit be brought at the father's domicile, cannot get more than it is allowed to get according to the law recognised at this latter place.

[The Supreme Court of Austria, on 31st October, 1871, held that it was competent to give decree for aliment against the father of a bastard, in a case where both he and the mother were foreigners, and that the condition and measure of the claim was the law of the mother's domicile.]

<sup>9</sup> The extent of the paramour's obligation can only be determined by the law of the domicile of the mother at the time of the child's procreation, and not by the law of any subsequent domicile of the mother (Koch, on § 23 of the introduction to the Prussian A. L. R., is of a different opinion). For although the mother and the child come under the protection of the law of the new domicile, yet it cannot be laid down that that law will give them a right which has its origin in an act that took place previously. Otherwise the mother would have it in her power to throw an obligation upon her paramour at her pleasure. If the mother changes her domicile after connection, but before the birth of the child, the defender must be amerced in accordance with the law of the new domicile, if he has had connection with the mother since her change of domicile. With this the Plenarbeschluss of the Supreme Court of Berlin, 1st February, 1858, accords (reported in the Decisions of the Supreme Court at Berlin, xxxvii. 1-16, and by Seuffert, xii. p. 444), "because the right of the child arises when it is begotten, although it is first put in force when the child comes into the world with the capacity for life."

act occurred from which these rights take their origin allows;<sup>10</sup> for it is to these alone that the paramour is subject.<sup>11</sup> If, on the other hand, we were to ask that the persons and the property of our subjects should enjoy more ample protection abroad than the laws of that place permit, we should extend unwarrantably our laws into the territory of another State.<sup>12</sup> Finally, the judge must always dismiss an action, if the law of his country shall hold it to be unbecoming or immoral.<sup>13</sup>

<sup>10</sup> The obligation of the paramour arises immediately from his relation to person of the stuprata, cf. *supra*, §§ 87-88.

<sup>11</sup> See note 14, as to the rule when there have been several acts of connection at different places within the critical time.

<sup>12</sup> If the obligation depended on a delict it would have no reference to the law of the domicile.

<sup>13</sup> The provision of the 340th article of the Code Civil: "*La recherche de la paternité est interdite*" makes an action by a bastard who has not been recognised as improper; every court, therefore, in whose jurisdiction the Code Civil is recognised, must throw out such an action as incompetent. (Judgment of the Court of Cassation of the Rhine at Berlin, 29th Dec. 1830. Volkmar, p. 147). But that provision is not a mere rule of process. The law of France gives no legal title to a child, from the mere fact that the person against whom he makes a claim has had connection with his mother, a provision very carefully laid down in article 340 as to abduction. (See the Plenarbeschluss of the Supreme Court at Berlin, p. 46, cited in note 8). Fœlix, i. § 33, p. 84, note 2, is of opinion that no claim could be made against a Frenchman, even in a foreign country, by a child begotten upon a foreign woman, whereas the child of a Frenchwoman will have right of action against a foreigner in his domicile, if the action is competent by the law recognised there. It may often be doubtful whether a law which allows action upon illicit intercourse as a general rule, but under special circumstances excludes it, considers the action raised in any particular case as improper or immoral. For instance, the Prussian Statute of 24th April, 1854 (G. S. 1854, p. 193, §§ 9, 13), provides that the claim recognised in other cases should not hold in the case of the children of persons who were censured for incontinence. In the judgment of 4th October, 1858, already quoted, the Supreme Court rejected the plea of a Prussian subject founded on these provisions, advanced by him in an action raised by a woman of Brunswick, because the paragraphs cited only give rise to an *exceptio*. It cannot, however, according to my view, signify whether the defender is obliged to aver the circumstance in question and to prove it (to advance it *ope exceptionis*) or not, in order to establish that a particular action is to be held *immoral*. The defender must also guard against the *exceptio metus*, although an action proceeding upon an extorted promise is held to be *contra bonos mores* (Puchta, Pandects, § 56). The provision of § 9, 2a of the Prussian law already cited, whereby the claim falls if the mother has taken money or a present for the act of inter-

Those who deduce the obligation for aliment from a delict, found either upon the law of the place where the intercourse took place or of that where the action is brought.<sup>14</sup>

If, on the other hand, kinship is to be held to be the origin of the obligation,<sup>15</sup> then the law of the domicile of the defender must in the first place decide.<sup>16</sup>

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course, may be referred to considerations of morality. See too the Plenarbeschluss cited, p. 51.

<sup>14</sup> Reyscher, § 82 ; Phillips, p. 192 ; Bluntschli, i. § 12, iii. 3 ; Judgment of the Supreme Court of Appeal at Munich, 1st Dec. 1829 (Seuffert, i. 157) ; Plenarbeschluss of the same Court, 5th June, 1855 (Seuffert, iv. 325) ; and the judgments of the Supreme Court of Appeal at Jena in 1835 and 1839 (Seuffert, ii. p. 161), all are in favour of the *lex loci delicti commissi*. The *lex fori* is supported by Mittermaier, § 30 *ad fin.* ; Savigny, § 374 ; Guthrie, p. 255 ; Unger, pp. 196-97 (who, however, proposes to settle the scope and duration of the obligation by the law of the father's domicile) ; Harum, in Haimenl's Magazine, viii. p. 397 (not, however, because the action arises upon a delict, but because the rights of the child are inherent in the relation itself, and must, therefore, be determined by every system of law according to its view of morality) ; Judgment of the Supreme Court at Stuttgart, 28th March, 1846 (Seuffert, iii. 161). (In the case in question the child was one begotten upon a woman of Würtemberg, in Baden). Seuffert (Comm. i. p. 245) argues against the view which takes the *lex loci delicti commissi* as the rule, that when there have been various acts of connection in different places at the critical time, the decisive place is not easily ascertained ; but his argument is not substantial. The question is not whether the child is the fruit of any particular act of connection, but whether that was possible. The pursuer may in this case appeal to the local law which is most favourable to her. The Supreme Court of Appeal at Dresden consistently follows the theory that the law of its own country must rule civil claims advanced there, and proceeding upon illicit connection with a foreign woman in a foreign country. Judgment of 20th Sept. 1860, Seuffert, 14, p. 334. The Draft Code for the kingdom of Saxony says in art. 1560 : " Claims arising upon a birth out of wedlock, which are advanced before the courts of this country, are to be determined by this Code, although the birth took place abroad." But in the second part this addition is made : " If, however, the woman is a foreigner, and the birth takes place in a country where the law does not allow her or her child to make any claim, they cannot bring any in Saxony. In so far, however, as different kinds of claims are recognised by the law of the foreign State, they will be recognised in Saxony also, and their amount determined by the provisions of this Code." This draft, as may be seen, comes very near the view adopted in the text.

<sup>15</sup> This seems wrong, if, as in the common law of Rome, it is no answer to the claim that the woman, during the time of conception, had intercourse with several men.

<sup>16</sup> Gand, No. 462 ; Wächter, ii. p. 460 ; Seuffert, Comm. as cited ; Günther,

Some territorial systems give the bastard who has not been recognised, besides his claim of aliment, a right of succession *ab intestato* to his mother's paramour. It need scarcely be said, however, that the law which determines the succession is the only one that can decide, and therefore, in so far as moveable succession is concerned, the law of the last domicile of the deceased.<sup>17</sup> For in its very nature such a provision only goes so far as the law of the succession of any particular person permits, or can permit. The right of succession *ab intestato*, which the Prussian A. L. R. 2, ii. §§ 652-54, gives to a bastard who has not been previously voluntarily recognised by a judicial act, cannot be pleaded if the child's father had his last domicile in a country where the common law of Rome prevails, even although he may have left immoveables in Prussia. Third persons, too, such as the paramour's father, are only liable to claims in so far as the law which rules the circumstance in virtue of which the burden is laid upon the paramour—*i.e.*, the law of his domicile binds them.<sup>18</sup>

The claim of the mother for damages, on the other hand, on account of her seduction, is really a claim upon a delict. (See *supra*, § 88.)

#### Note Q, on § 105.

[Claims for aliment will be viewed favourably by all courts, and will be enforced against parties not otherwise subject to

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p. 732, holds that the obligations arising out of the circumstance in question have effect in the father's domicile, only if and in so far as they are in accordance with the law of that domicile as well as with the law of the mother's domicile. A judgment of the Supreme Court of Appeal at Lübeck, 20th Nov. 1857, reported by Seuffert, 9, p. 325, decides in favour of the *lex domicilii* of the defender.

<sup>17</sup> See Wächter, ii. p. 397.

<sup>18</sup> Supreme Court at Berlin, 1st Nov. 1850 (Decisions, xx, pp. 300, 304, 307): "Foreign bastards cannot acquire any rights by the interpretation of a disputed rule of the common law adopted in Prussia which they do not enjoy according to the interpretation adopted in their own country. . . . Conversely, if the law of this country gives a bastard no claim of aliment against the father of his father, while the *lex domicilii* does, it is important to observe that in no case can obligations be imposed upon a native of this country by a foreign law without his consent, to the effect that he can be asked to satisfy them here, although our law recognises no such duties."

their jurisdiction. This is a consequence of the claim being due *ex debito naturali*, and presumably the same in every civilised country. The French courts will allow one foreigner to sue another for aliment, although as a general rule they are closed to suits between foreigners (Bouchard, 10th May, 1876, Trib. Civ. de la Seine). In another case, where the same rule was applied against a defender resident but not permanently domiciled in France, it was remarked : " The action is founded on a natural obligation, as well as consecrated by public law, and it touches public decency that it should be implemented " (Frings v. Mathyssens, 3rd May, 1879, Trib. Civ. de la Seine). French children have been held liable by the French courts to aliment their father, who had become naturalised in America, on the ground that the paternal relation, on which the obligation was founded, took its origin before his American naturalisation (Trib. Civ. de la Seine, 22nd May, 1877). In Scotland it has been laid down that personal presence in the territory for however short a time will found jurisdiction to entertain an action of aliment by a child against a father, the father having the child with him within the jurisdiction of the Scottish courts, per Lord Mackenzie in Ringer v. Churchill, 2 D. 316.

The same favourable view is taken of claims for aliment by a wife against her husband. The court of any country where the husband resides will, according to French decisions, entertain a suit for aliment, and if the marriage is denied, process will be sisted until this question can be determined by the judge of the proper domicile (Ullmann, 20th April, 1880, Cour de Paris). The general principle upon which this assertion of jurisdiction is advanced, is forcibly stated in a judgment of the Civil Tribunal of the Seine, and is put upon considerations which will hold good for all systems of jurisprudence :—" Marriage is a contract belonging at the same time to natural law and to the law of nations ; it creates for the spouses rights and duties which follow them everywhere, and which they are bound mutually to observe in a foreign country as fully as in their own ; in particular, one of its results is the obligation on the husband to receive his wife in his house, and to supply her wants." Following out this general statement of the law the Court ordained a



foreigner trading in France and resident there, to entertain his wife in his house, or otherwise, to pay her a certain allowance (*Stoops v. Stoops*, 31st Aug. 1878). As to interim awards of aliment, while actions for divorce are pending, see note on § 92.]

## F. GUARDIANSHIP.

### § 106.

We have already, in dealing with the law of persons, discussed the incapacity of certain persons, and in dealing with the law of contracts, the obligations of guardians or curators; all that remains now is to inquire, while we are occupied with the law of the family, by what rules the representation of a minor, or person under curatory, should be determined. This is the aspect of guardianship which belongs to the law of the family; we have here to deal with the authority exercised by a guardian or curator over the person and the property of his ward in a fashion analogous to the exercise of the authority of the father.

The principle which rules the whole subject is that, according to the theory of the law which has in modern times been generally accepted,<sup>1</sup> guardianship exists solely in order to ensure a permanent protection of the person of the ward, and that this protective care must be entrusted to the State, and regulated by the law of the State to which the ward belongs.<sup>2</sup> It is an immediate result of this principle that, except in the practice of English, Scottish, and American courts, there is a recognised rule that the guardian is named by the judicial authorities of the domicile, and has to administer the estate of the ward, whether in that country or abroad, and to represent him before foreign courts;<sup>3</sup> although

<sup>1</sup> For an exception, see note 3 below.

<sup>2</sup> Savigny, p. 380; Guthrie, p. 303.

<sup>3</sup> This is the decision of Argentræus, No. 19; Hert, iv. 29; Everhardus, Consil, vol. ii. cour. 28, No. 82; Andreas Gaill, Observat. ii. obs. 123, No. 6; Stockmann's Decis. Brabant decis. 125, No. 6; Petr. Peckins, De Test. conjug. iv. c. 28, § 7; Molinaeus in Leg., l. C. de S. Trin.; Boullenois, ii. p. 320; Foelix, ii. § 466, p. 202, and i. § 33, p. 81, and § 89, pp. 206-07. Massé, No. 62, distinguishes between the appointment of a guardian for the person and for the estate. In the first case the *lex domicilii* is to be the general

we do not deny the competency of appointing more than one guardian within the limits of one and the same territory, a course which reasons of convenience will justify in cases where there are different estates lying apart from each other.<sup>4</sup> Of course, every court is competent to make provisional regulations—*i.e.*, to appoint a provisional guardian in cases of necessity, when it finds a person or an estate within its jurisdiction in want of immediate assistance, just for the very reason that there is in such a case no question of per-

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rule, and therefore he is in fact of the opinion taken in the text.\* As to the case of a curator appointed to the estate, in which connection he refers chiefly to the *curator bonorum* in bankruptcy, see the law of bankruptcy *infra*. Kraut, Guardianship, i. p. 284, describes the view taken here as the general usage in Germany, although some particular systems may differ from it. Cf. Bouhier, chap. xxiv. No. 63; Gand, Nos. 488-89; Merlin, Rép. Autorisation Maritale, § 10; Vattel, ii. 7, cap. 7, § 85: "*Le droit des gens qui veille au commun avantage et à la bonne harmonie des nations, veut que cette nomination d'un tuteur ou curateur (par le juge du domicile) soit valable et reconnue dans les pays, où le pupille peut avoir des affaires.*" Holzschuher, i. p. 86; Thöl, § 81; Schäffner, p. 55. The treaties collected in Krug (pp. 26-9) provide without exception that, as regards all moveables, the guardianship should be constituted by the court of the domicile, and recognised in the other State. But if there are foreign immoveables in question, then, according to some of these treaties, the guardian appointed by the courts of the domicile is to be recognised by the authorities of the other countries as having right to the estate. Others give the authorities of the court where the estate lies the power of appointing special curators as far as it is concerned, or of confirming the foreign curator, who must, however, in all his dealings with the estate in question, observe the conditions which the law of the place requires. (For the interpretation of this latter provision, see *infra*, note 20.) According to these treaties, the courts of both countries shall account to each other for the application of the income.

<sup>4</sup> Cf., *e.g.*, L. 20, § 2; D., de excus, 27, 1. The provision in this passage, that the *præsides* of the various provinces where the property of the ward lies should appoint guardians, is to be treated as a rule of convenience which can only be applied within one territory. Provisions for the care of the pupil and his estate will be dealt with in a similar fashion by all courts within the same territory (and in the Roman empire the whole territory was one); and, therefore, it matters not which of the various officers appoints the guardian and superintends him. It is a different matter when the officers of different States are in question, who may be under different systems, and regulate their superintendence of guardians by different principles. In this case, too, it may seem convenient to appoint different guardians. The administration, however, must be managed through the judge of the pupil's domicile, and in accordance with the law of that domicile.

manent protection, but merely of a temporary guardianship, which is due to every one who happens to be in the country, or to possess estate there, and which is the only means of protection that can be exercised in such circumstances.<sup>5</sup> The opposite view, by which the validity of the appointment made at the domicile of the ward is not recognised, even as regards the moveables situated abroad,<sup>6</sup> cannot be logically carried out. If that appointment is not recognised by the State, it has the right and the duty of appointing a guardian so soon as any piece of property belonging to the pupil falls into its territory. Otherwise not only would the person who stands in need of representation by a guardian be deprived of all protection, and of the capacity of making contracts, but the subjects of that State would be placed in a most dangerous position if they desired to make contracts with such a person. A special guardian will probably not be appointed unless the rights of the ward are to be pleaded in some court.<sup>7</sup> To require such an appointment in every case seems to be a pure oppression of one from whom the State exacts taxes and duties without making any return therefor, as it does by the appointment of guardians in the case of its own subjects. It is impossible, as we have seen in practice, to appoint a guardian for every foreigner who happens to be for a time in the country, or to possess moveable property

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<sup>5</sup> Gand, No. 489. Püttlingen, § 61, describes this as a duty of humanity, and very properly desires that the curatory should be handed over as soon as possible to the officers who have personal care of the foreign ward. The procedure of the court until the foreign officials take over the curatory can, of course, only be conducted in accordance with its own law; and this procedure will be recognised by the courts of the domicile, if it has not exceeded the limits of provisional management. According to the Austrian Code, the matter seems doubtful. Püttlingen, on the ground of §§ 189-90, applies the opinion stated in the text to it. Unger (p. 198), looking to §§ 225-26, 240, holds that no doubt a guardian nominated abroad requires no confirmation in the Austrian courts, but that where a ward has real property in Austria, a special curatory must be established in Austria, according to the *lex rei sitæ*.

<sup>6</sup> Story, §§ 540a, 499. So, too, the practice of the courts of England, America, and Scotland. See, too, Mittermaier in Archiv. für Civil Praxis. 14, pp. 304-05. [See *infra*, p. 443-44.]

<sup>7</sup> This is the result of the practice of England and the United States. Burge, iii. pp. 1010-11. [See *infra*, p. 444.]

there ; and the matter, as a rule, is reduced to this, that it becomes necessary to appoint as guardian the person appointed at the domicile, who alone has the necessary information as to the circumstances of the ward.

It may be objected that, where a practice of this kind has grown up out of reasons of convenience, it should be maintained, and that where that is not the case, the principles that hold as to the sovereignty of individual States should rule ; and that, as the guardian is clothed with the character of an official of the Government, no one who is nominated to that office by a foreign Government can act in this country unless confirmed by the Government of this country. But although the guardian in modern times holds his position by the appointment of the Government, yet that does not by any means prove that he exercises any of the functions of a Government official. The truth is rather that, under certain limitations, he exercises a family authority which belongs to the father in other cases. The difference merely consists in this, that the father holds his authority by direct provision of law, while the guardian holds his position by an act of the Government, proceeding likewise upon the ground of the common law of the domicile, and importing, therefore, the same effects as the paternal relation.<sup>8</sup> It cannot, therefore, be said that a special license should be required in order to give a guardian appointed by Government officials the right to exercise the same powers which the father can undoubtedly exercise over the moveable property of his child in a foreign country.<sup>9, 10</sup> One might just as well require that

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<sup>8</sup> In Roman law, as is well known, there were many cases in which the guardian did not require any authority from the Government for the administration of the ward's property. Burge himself (iii. p. 1002) recognises that the appointment of a guardian or curator by the *judex domicilii* is to be recognised everywhere as far as the person of the ward is concerned.

<sup>9</sup> The person of the ward must be given up to the guardian if he demands it. If, however, *dolus* on the part of the guardian is inferred, this surrender may be refused until correspondence has been had with the officials of the ward's domicile charged with the superintendence of curatories, and a provisional curator may be appointed. See *supra*, note 5.

<sup>10</sup> The analogy which Story, § 504, draws of the confirmation of foreign executors and administrators who wish to get possession of moveable estate belonging to a foreigner, and situated in a territory where the common law

the officials of a foreign Government should be confirmed, in order to entitle them to represent their subjects and follow out their rights in a foreign country. An intermediate view proposes that the office of guardian should be recognised as far as regards the moveables situated abroad, but requires the appointment of a special guardian for the real property which the ward may have in another country.<sup>11</sup>

This view may no doubt be carried out; but it cannot derive any support from the argument that the exercise of the office of a guardian, without previous confirmation by the authorities of the country where it is to be exercised, is an invasion of the sovereign rights of that country, any more

prevails, cannot be approved. In that case we have to deal with the institution in possession of one who previously had no rights; in the case of guardianship we have to deal with the exercise of a family authority over the pupil's person, and the representation of him by his guardian.

<sup>11</sup> Burgundus, ii. 18; Martens, § 98,—the latter upon the ground that the question is one of an act of voluntary jurisdiction, which will not take effect abroad without special provision by treaty. The rule, however, is that acts of voluntary jurisdiction are good in a foreign country. Cf. *supra*, § 34, and Fœlix, ii. § 466. P. Voet, 9, c. 2, No. 17, remarks: "*Quamvis regulariter ab illo magistratu detur tutor, ubi pupillus domicilium habet ubi parentes habitaverunt: etiam qui dat tutorem, eum primario personæ non rei dedisse censetur, adeoque is, qui simpliciter datus est, ad res omnes etiam in diversis provinciis sitas datus intelligitur, id quod plerumque jure Romano obtinebat, quo diversarum provinciarum magistratus uni suberant imperatori. Ne tamen videatur Judex domicilii quid extra territorium fecisse, non præjudicabit Judici loci, ubi nonnulla pupillaria bona sita, quin et tutorem pupillo ratione illorum bonorum scilicet immobilium recte dederit. Unde etiam si de prædiis minoris alienandis contentio, si quidem in alia sita sint provincia, tutius egerit tutor, qui datus est in loco domicilii, si decretum ab utroque Judici curet interponi et domicilii pupilli et rei sitæ.*" Cf., too, J. Voet, in Dig. 26, 5, No. 5: "*Non autem in loco originis vel situs rerum pupillariorum, sed tantum in loco domicilii pupillaris tutores a loco illius camera pupillari aut magistratu creari, moris est, qui hoc ipso dati intelliguntur universo pupilli patrimonio, ubicumque esistenti. Quod tamen ex comitate magis quam juris rigore sustinetur; quum in casu, quo pupillus immobilia habet sita in eo loco qui non subest eidem magistratui supremo, cui pupillus subest ratione domicilii, magistratus loci, in quo sita immobilia, rebus in suo territorii existentibus peculiarem posset tutorem dare.*" Maltheus, De Auction, i. c. 7, No. 10, is of another view: "*Sic enim et tutor hodie a judice domicilii datus: nec tamen universorum negotiorum ad bonorum administrationem consequitur, nisi cessit judex ejus territorii, in quo prædia sita sunt.*"

than the second view, already dealt with, derives support from that argument. Moveables, so long as they are in any State, are subject to the sovereignty of that State no more and no less than immoveables : the distinction merely consists in this, that in the one case the hold of the State over the property is temporary ; in the other it is permanent.

This view, however, may be historically explained as follows :—

In the first place, according to older German law, the nearest male agnate of the ward,<sup>12</sup> that is, the person who was entitled to succeed to his real property, either solely or at least for the greater part, was entitled to be appointed guardian ;<sup>13</sup> it was, therefore, no great step to hold that the right of guardianship was merely one of the effects of the succession to which the guardian was entitled ; the influence was all the easier that by older Germanic law, in which the guardian merely protected the next heirs and rendered an account of his intrusions to them,<sup>14</sup> guardianship truly existed, in the first place, in the interest of those next entitled to the succession, while, according to the provisions of many particular systems, the guardian actually drew the income of the estate for himself during the subsistence of the curatory.<sup>15</sup> If, then, succession in real property was by that older law subject to the *lex rei sitæ*, we have an explanation of the fact that the position of the guardian is determined by the *lex rei sitæ*, and the operation of any appointment of a guardian is confined to the immoveables situated in his own territory.<sup>16</sup>

In the second place, however, feudal law required the guardian of the vassal to pay the vassal's prestations to the overlord. It naturally depended upon the *lex rei sitæ* who

<sup>12</sup> Kraut, die Vormundschaft nach den Grundsätzen des Deutschen Rechts. (Guardianship according to the principles of German law), i. p. 165.

<sup>13</sup> Beseler, ii. p. 489.

<sup>14</sup> Kraut, Vormundschaft, i. pp. 92-3.

<sup>15</sup> Kraut, ii. p. 54. By the law of the Longobardi, the guardian had as such a claim of succession to the ward's estate, Kraut i. p. 390.

<sup>16</sup> The judges named by the same lord in one country act in his name, and therefore with authority recognised all over his territory. See note 22 with regard to Great Britain.

could and should fulfil these duties, and it was necessary that the overlord should confirm any appointment to the office of guardian made abroad, especially as the older law made him the guardian himself of the feudal estate, and gave the office of guardian in other matters to another vassal.<sup>17</sup> As the feudal relation was more widely prevalent in earlier times we can understand that older writers could not distinguish accurately between this feudal guardianship and guardianship proper, which existed merely for the interest of the pupil; and, again, that the practice of England and the United States, since in theory the doctrines of the common law of these countries as to real property rest entirely upon feudal principles,<sup>18</sup> should require the appointment of a special guardian, or at least the confirmation of the guardian appointed by the *judex domicilii* for property situated in a foreign country.<sup>19</sup>

Modern law, on the other hand, holds that guardianship has no other object than the interest of the ward; it cannot, therefore, be regarded as being derived from the law of succession or from feudal law; even in England the rights of the overlord in landed property have disappeared except in the case of real feudal holdings, which can be shown to have been given out by the Crown for a definite period, and to have fallen under the right of reversion.<sup>20</sup> There is, then, no other tenable ground left to support the nomination of a special guardian by the officers of the State in which the property lies; and we must abandon that position all the more certainly that the result will be either that unnecessary expense and trouble will be incurred by confirming the

<sup>17</sup> Beseler, ii. p. 191.

<sup>18</sup> See *infra*, § 107.

<sup>19</sup> Boullenois, iii. p. 30, and Bouhier, chap. xxiv. Nos. 63-4, distinguish ordinary guardianship from the *Garde noble*, which occurs in French customary law, and is a rule of the feudal system. See, too, Thöl, § 81 *ad fin.*

<sup>20</sup> The curatory which some of the German legal systems give over the estate of one who has disappeared (cf. Kraut, ii. pp. 217-66), which belongs along with the right to the income to the next heirs, must be regulated by the law which determines the right of succession to the estate of the person who has disappeared, and therefore in certain circumstances by the *lex rei sitæ*, but as a rule in Germany by the *lex domicilii*. So, too, by French law, Fœlix, ii. pp. 116, 205.

guardian nominated by the *judea domicilii*,<sup>21</sup> who will follow the principles recognised at the ward's domicile in the administration of the estate, or that the interest of the ward in place of being advanced, will be exposed to the utmost disadvantage by the appointment of a special guardian, who will act according to the principles of the *lex rei sitæ*, and independently of the guardian appointed at the domicile of the ward.<sup>22</sup>

No doubt, grounds of expediency may recommend the appointment of special guardians at the place where the estate is ; but it must be administered according to the law of the ward's domicile.

It follows from these principles that the guardian has all the privileges which the *lex domicilii* of the ward gives him and no others.<sup>23</sup> This, for instance, will determine whether the guardian can alienate any subjects without the sanction of the court, and if so, what subjects, and again what payments he is entitled to receive.<sup>24</sup>

The alienation of the ward's property constitutes a question of importance, and one that is much disputed. Many

<sup>21</sup> As to letter of administration in questions of succession, see *infra*, § 113.

<sup>22</sup> The matter is otherwise when different guardians are appointed by courts which are all in the same State (see note 4 to this paragraph), since both courts and guardians act on the same principles. See, however, *supra*, § 28. It is, however, only recently that the Lord Chancellor of England has been empowered to name curators of lunatics to administer property in the colonies. Burge, iii. p. 1000. The courts of Scotland and England treat the appointments of guardians made by each other in the same way as if they had been made by some foreign State. Cf. Story as cited. [*Infra*, pp. 443-44.]

<sup>23</sup> As to the right of the guardian to change the domicile of a minor, see *supra*, § 31, note 11. A change of domicile will transfer to the courts of the new domicile the right of superintending the administration. A provision such as the 85th section of the introduction to the Prussian A. L. R. ("A change of domicile on the part of the ward or his parents does not produce any alteration in the administration of the guardianship") can only be applicable in a case where a new residence is taken up, and not where there is emigration in the true sense. For this it is undoubtedly necessary that the authorities charged with the superintendence of curatories should assent. This is the decision of a rescript of the Royal Prussian Ministry of Justice on 12th Jan. 1827 (Mannkopf, vol. vii. p. 16). The case reported by Savigny (§ 380 ; Guthrie, p. 305) may be explained as one would explain a provision of the deceased father of the pupils.

<sup>24</sup> Unger, p. 198, note 153.



authorities who desire that in other matters the *lex domicilii* should decide, and give the guardian appointed by the *judex domicilii* the right of administration even in a foreign country, make an exception in this case, because the question here is one as to the power to dispose of property, and does not affect the person of the ward.<sup>25</sup> But if, as Savigny remarks,<sup>26</sup> a statute ordains that the property of a pupil is only to be alienated under certain restrictions, that constitutes a protective regulation for the person of the ward, who stands in need of protection; it is no mere regulation for the protection of the property, as an object of commerce which it is desirable to set on a firm basis, so as to assure the most advantageous return from it; such a theory would make the law a real statute. In order to ensure the true object, particular forms of alienation are required, and alienation by a guardian will not have the same effect as the act of an owner of mature age unless these forms are observed. The object of a law of that kind is to give effect to acts of the guardian: it is no real statute, but a personal statute.<sup>27</sup> The explanation of the desire of the older authorities in so many instances to apply the *lex rei sitæ*, is that they confused the right of the next heirs, recognised in some districts, to prevent the alienation of a particular

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<sup>25</sup> Argentæus, Nos. 19, 20; Burgundus, i. § 16; Cocceji de fund, vii. 8; Molinæus in L. 1, C. de S. Trin. Merlin, Rép. Majorité, § 5; Burge, ii. p. 270, i. p. 14; Schöffner as cited—are all in favour of the *lex rei sitæ*. See, on the other hand, Savigny as cited.

<sup>26</sup> Rodenburg, i. 3, § 7; Bouhier, cap. 24, No. 10; Walter, § 46; Thöl, § 81, are for the *lex domicilii*. P. Voet, i. 9, c. 2, No. 17, declares that he is doubtful. "*Tutius egerit tutor, qui datus est in loco domicilii, si decretum ab utroque judice curet interponi.*" See, too, Krug, pp. 27-8, as to the treatises cited, *supra*, note 2. "Among the statutory provisions which hold good at the seat of the property," and which the foreign guardian in his dealings with that property must observe, are to be understood the statutes which relate to that real property as such (*statuta realia*). On the other hand, the question, for instance, whether the estate can be alienated, is in every case to be settled by the principles of the law of the country where the chief curatory depends. Everhardus, jun., Const. ii. cons. 28, No. 82; Stockmann, Decis. Brabant. decis. 125, No. 10; Peter Peckins, de Testam. Conjugum, iv. c. 28, § 7, declare that a decree of the *judex domicilii* is sufficient.

<sup>27</sup> The *judex domicilii* is therefore competent to pronounce decree *de alienando*, Kraut, ii. p. 147.

estate without their consents with the provisions of the Roman law, which had no other object than the interest of the wards; and this confusion was all the more natural (Kraut, ii. pp. 35-6), as the sentence of the judge would in cases of necessity take the place of that consent.<sup>28</sup>

The exclusive application of the *lex domicilii* is strengthened by the consideration that in many cases it will be impracticable to observe the forms required by the law of the place where the property lies if the pupil has his domicile elsewhere. Thus, according to the 451st Article of the Code Civil, it is necessary, in order to alienate real property belonging to a ward, besides some other formalities, that there should be a resolution of the family council, confirmed by the court of first instance after consultation with the Procureur Impérial. The family council is summoned, according to the 406th Article, by the *Juge de Paix* at the minor's domicile, and is advised by him. What is to be done if at the domicile of the minor there is no family council, and no *Juge de Paix*?<sup>29</sup> On the other hand, the question whether the property so alienated has been taken possession of, or the wider question, whether restitution on the head of minority must be allowed where possession has followed, will be ruled by the law of the place where the estate lies.<sup>30</sup>

As to the right of hypothec which the ward has over the property of the guardian, see *supra*, § 65, note 10.

[The State cannot require a foreigner to take up a curatory or guardianship.]

#### *Note R, on § 106.*

[The general principles of international law which regulate the recognition of the appointment and administration of foreign guardians are identical, whether the incapacity that gives rise to the guardianship is due to incomplete age, mental weakness or disease, or prodigality. These three

<sup>28</sup> This will meet the practice cited by Schäffner, p. 56.

<sup>29</sup> With this view the judgments of the Supreme Court at Berlin, 25th March, 1838 (Simon and Strampff, vol. i. p. 279) agree, and those of the Court of Cassation of the Rhine, 5th July, 1847 (Seuffert, 2, p. 1). I know no judgments of German courts to the contrary.

<sup>30</sup> See the judgment last cited, and *supra*, § 64, note 14, § 56, note 8.

kinds of incapacity may be considered together, since the *incapax* from any of the three causes falls into the same legal position, and the rules of law in different countries are the same in all of the three cases.

The principle that the interest of the *incapax* is the first thing to be considered has regulated the practice as to the appointment of guardians in America and continental countries, and has now been adopted in England also, except where real estate is concerned. Thus, in France a foreigner will not be excluded from the family council, nor from the office of tutor, merely because he is a foreigner, if he is otherwise suitable for the office (*Dunn v. Dupuis*, 1st May, 1879, Trib. Civ. de Versailles); a foreign father may be appointed tutor to his son, who is a French subject, if that is most convenient for the interests of the child (*Bourchy v. Antoine*, Trib. de Briey. 24th Jan. 1878); and a foreigner resident in Louisiana has been nominated to be the tutor of his children by the courts of that State (1874, Succession Guillemain, 2 A. 634). The Belgian courts have refused to appoint a foreigner to the office of tutory (*Prince of Rheina-Welbeck v. Comte de Berlaimont*, Trib. de Namur, 12th Aug. 1872); but this decision is pronounced by the Reporter to be of doubtful soundness. The Scots courts have refused on grounds of expediency to appoint persons out of their jurisdiction to be tutors or curators; but they will recognise the appointments of foreign courts to such offices, except where real estate forms the subject which is to be administered. It is no doubt the influence of the maxim that the interest of the *incapax* must be the leading consideration for the court that has induced the courts of the continent, in countries where nationality and not domicile is generally accepted as founding jurisdiction, to exercise a protective jurisdiction, *ratione domicilii*, in cases of incapacity, and appoint guardians to persons who are of foreign nationality, and have no more than a domicile, or it may be in some cases merely a residence, within the territory of the court. The French law allows a French citizen to change his domicile without changing his nationality, to the effect of submitting the tutory of his children to a foreign law. So, too, a Frenchwoman who has been married to a foreigner, but has on her widowhood returned

to France and recovered her French nationality, may be appointed tutrix to her children who are resident with her in France, although their nationality will be that of their father. The appointment is made by the French courts, and the rights and duties of the tutrix on the one hand, and the security given to the wards on the other, over her estate, are those which the law of France allows. This decision bears to proceed upon considerations of social order and public morality (Sokolowski, Bourges, 4th Aug. 1874). So, too, from similar considerations of the interest of the wards, in a case where the father of a family, himself a foreigner, was in jail in a foreign country, and his children, who were with their mother in France, had been left unprotected by her death, the French courts appointed a tutor, although no such step had been taken in their own country (De Nau, 10th April, 1877, Trib. Civ. de la Seine). The courts of Belgium will place a foreigner who is resident in Belgium under curatory as a prodigal. "The Court extends to foreigners the benefit of all the laws that have in view the protection of person or of property" (Cour d'Appel de Bruxelles, 9th June, 1873). This same jurisdiction, in a case of prodigality, has been exercised by the Italian courts (Dulché v. Pirola, 1st July, 1872); and in the case of Stocker Kirkhope, decided by the Court of Appeal at Lucca, 1st Sept. 1875, the Court laid down that in cases of incapacity in persons who were domiciled or resident in Italy, there was jurisdiction in the Italian courts to assume the administration of the affairs of the *incapax*, but only if the courts of his own country could have exercised a similar jurisdiction in the circumstances that had occurred. In the case of interdiction on the ground of prodigality, the French courts have followed a similar rule, laying down that a process of interdiction will be allowed to proceed in France if it is just and advantageous for the interests of the *incapax* that it should do so (May v. Sheppards, Cour de Caen, 20th Jan. 1873).

These were all cases where no competing appointment had been made for the protection of the *incapax* by the court of any other country, and they have been cited for the purpose of showing that the interests of the *incapax* are of such importance that the courts of the country where he is found

will not hesitate to exercise a protective jurisdiction for his behoof. But on the continent the *status* of guardianship once validly constituted will be recognised according to the *lex domicilii*, wherever the ward may go, or wherever his property may be, and no distinction will be taken between real and personal property. In Austria, for instance, the courts have refused to sanction a sale of real property situated there, belonging to minors who were of foreign nationality and domicile and under a foreign guardianship. The necessary authority must be obtained from the court that is charged with their guardianship (Supreme Court of Austria, 4th Jan. 1870).

In so far as domicile is taken as the criterion of jurisdiction, the law of England and Scotland is in conformity with these cases, for domicile and not nationality is in all cases taken by it as founding jurisdiction. But the jurisprudence of England and America stands alone in this, that they hold that if any person *incapax* comes within their jurisdiction their courts have power to take up the care of his person and the management of his affairs, although a foreign guardian has been already validly appointed: that they should have jurisdiction in cases of necessity to appoint, on the ground of residence, without requiring a full domicile, is reasonable, and is sanctioned by the principles of the continental decisions cited above, and the courts of Scotland would, in pressing cases, hardly hesitate to make such an appointment *ad interim*. But the law of Scotland recognises, in so far as the custody of the person and the management of the personal estate are concerned, the appointment by a foreign court without requiring any new appointment to be made or the old one to be confirmed. In England, however, and in America the courts maintain their rights of jurisdiction over all such persons within their territory, and have exercised them in such cases as *Johnstone v. Beattie*, 10 Cl. and Fin. 42. But in more recent times the courts of England have receded from this extreme position, and their attitude as described by Mr. Westlake is this:—As regards the custody of the person of one *incapax*, “now at least the English court, in appointing a guardian or committee of the person, will support the authority of the guardian or committee existing

under the personal law or jurisdiction, and not defeat it unless it should be abused," and refers to cases in point: (cf. also Wharton, § 260 *et seq.*); as regards the estate, the foreign guardian can sue and give receipts for personal property belonging to his ward, and it will therefore seldom be necessary to appeal to the English courts to make a new appointment for such purposes. The courts of Scotland, in the case of lunatics as well as minors, will refuse to make any appointment in the face of one already made by a foreign court, to control the person or the personal property (cf. Fraser on Parent and Child, pp. 602 and 609).

In England, as in America, where real property is in question, the appointment will be made by the court of the country, and the administration of that estate will be regulated by the law of the country where the real estate is situated: "There is no question whatsoever that, according to the doctrine of the common law, the rights of foreign guardians are not admitted over immoveable property situate in other countries. These rights are deemed to be strictly territorial, and are not recognised as having any influence upon such property in other countries whose systems of jurisprudence embrace different regulations and require different duties and arrangements" (Story, § 504).

On the continent, as the author states, the *lex domicilii* will regulate the guardianship over immoveables just as over moveables.

In Scotland the law is thus stated by Lord Fraser (p. 605): "The practice in Scotch courts has been for some time to appoint a special guardian to Scotch heritage belonging to foreign wards;" and the person so appointed will always be a Scotsman within the jurisdiction of the court. In special circumstances the courts have allowed a minor to nominate as his curator a person outwith their jurisdiction, taking all possible precautions and exacting undertakings that the curator shall, in the matters of the curatory, submit to their jurisdiction; but very special circumstances require to be shown. Contrast the cases of Lord Macdonald (June 11, 1864, 2 M. 1194), where it was sanctioned, and Fergusson (Jan. 25, 1870, 8 M. 426), where it was refused. "But in regard to the administration of guardians for lunatics, as well

as that of guardians for minors, the question is yet undecided whether the *lex domicilii* will be recognised as the law to which the guardian is bound to conform in his dealings with property situated in Scotland," belonging to a ward having a foreign domicile (Fraser, Parent and Child, p. 609). There are indications that the *lex domicilii* of the ward would be held to regulate these (Lamb, 20th July, 1858, 20 D. 1323); but on the other hand, it is difficult to suppose that an officer appointed by the courts of Scotland should have wider or narrower powers according as the ward was by domicile a foreigner of this or that country or domicile.

## VI. LAW OF SUCCESSION.

### A. SUCCESSION IN GENERAL—INTESTACY.

#### § 107.

The law of succession prescribes how the property of one person on his death passes to another. The rules of succession may be figured in the following different shapes :—

First, it might be the case that nothing but the actual assets belonging to the estate of the deceased and his rights should pass to the successor, and that all debts should be discharged by the death of the person to whom they originally attached. Such a rule, which would make succession merely a form for acquiring particular things and particular rights, could never be satisfactory, except in a very low state of civilisation—a state in which claims and debts existed for a limited time only, where payment followed immediately upon delivery, and in which credit was unknown: the existence of any claim would depend entirely upon the uncertain length of the debtor's life, and the heir would no more be under an obligation to pay the debts of his ancestor than the person who had got any article from that ancestor by purchase or by gift.

Secondly, the estate might pass as a whole to another person, who would possess it precisely as the ancestor possessed it, and therefore take over the debts with it—in other words, so possess it that the legal personality of the ancestor

would be revived in the successor. This is the rule of the Roman law, and its result is the greatest security possible for the creditor, because the existence of the debt is quite independent of the life of the debtor, in so far as there is any one to take over the inheritance of the deceased as heir.

Lastly, we may figure an intermediate system : Certain articles included in the succession, such as real property is shown by its nature to be, are not affected by the debts ; other assets of the succession are affected even after the debtor's death by his liabilities, but in such fashion that the things themselves are alone responsible, and the persons who take, by virtue of the law of succession, are only bound to discharge the debts in so far as their share of the succession will suffice. This intermediate rule is the rule of the older German law ;<sup>1</sup> and it may be reconciled, too, with a more advanced stage of civilisation, in which it is not uncommon that claims of debt should exist for a considerable time, while the creditor must have some security against the event of the debtor's death.<sup>2</sup> The creditor may trust his debtor absolutely to the amount of the value of the property which is subject to be affected by debt after the death of the debtor, and still greater security is given if, as is the case in more modern times, it is competent, under certain conditions, to affect with liability for debts the specially important property in immoveables. If the rule of the Roman law ensures in the highest degree the creditor's safety, and gives his estate the greatest elasticity, the rule of the Germanic law, without overlooking the protection which the creditor needs, has at the same time in view the protection of the successor against a perpetuation of the liability for all time. The rule of the Roman law, which is quite unnecessary for the protection of the creditor, that all the successor's own resources and his own separate estate, against which the creditor could have no claim at the time the debt was contracted, should be made available to the creditor, is not retained : but the heirs and the family of the ancestor will not lose their right to the important estate, which, as a rule, no ancestor desires to

<sup>1</sup> Cf. Beseler, ii. pp. 486-87 ; Landlaw of Saxony, i. art. 6, § 3 ; Kraut, § 171, No. 28.

<sup>2</sup> The proof of this is, that this is still the rule of the law of England.



withdraw from them, unless there shall be some special arrangement previously made to affect them. In other words, there is in the German system what is partly a particular, partly a universal succession: the latter is applicable to the moveable,<sup>3</sup> the former to the immoveable succession; but still particular debts may pass along with the immoveable succession, if they are specially attached to it, and are in a certain measure made real rights.

It is a necessary result of regarding the position of the heir as a universal succession, by means of which the legal personality of the deceased passes over to his heir, that this transmission can only take place in conformity with the law of the land to which this legal personality of the deceased belonged at the time of his death—that is, the law of the last domicile which he had.<sup>4</sup>

On the other hand, if his position is regarded as a particular succession, then, as in the law of things generally, it is the law of the place to which the thing belongs that must be applied.

The laws of all civilised nations treat succession in moveables as we have seen as a universal succession;<sup>5</sup> the general rule for decision here is therefore the *lex domicilii*.

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<sup>3</sup> It is no essential of universal succession that the heir should be answerable beyond the amount of the succession. The truth rather is, that the succession is regarded as a purely arithmetical quantity, which may just as well result in a minus quantity as a plus (Cf. Savigny, System, i. 383). The conception of a universal succession is satisfied if the heir performs exactly those prestations which the ancestor, if he had lived, was able to perform; that this is so is shown by the association in Roman law of the *beneficium inventarii* with a universal succession. Just as the *hereditas jacens* represents the ancestor, although there can be no notion of responsibility beyond the amount of the succession, so, too, does the heir, who represents the ancestor only to a limited extent. According to Roman law, if the heir enters upon the succession that implies at once a new and independent obligation on the part of the heir, *quasi ex contractu*, to pay the debts of the succession, and this liability no one can incur, unless he is of status such as to be able to bind himself by legal transactions.

<sup>4</sup> On the obligations of the heir over and above the sum of the inheritance as an *obligatio quasi ex contractu*, see *infra*, § 113.

<sup>5</sup> The conception of a universal succession is not defeated by the fact that individual things belonging to the moveable estate are subject to some special destination, any more than by the fact that legacies and trusts may be combined with it.

Succession in real property is to be determined by the *lex domicilii*, if it and the *lex rei sitæ* agree in regarding this real property as a part of a universal succession embracing the whole estate of the predecessor. If the *lex domicilii* pronounces to the contrary, it will lay down no rules for real property situated abroad, which it will hold to be an estate quite separate from real property in this country and from the moveables; and, on the other hand, if the law of the place where the thing lies holds succession in real estate as a particular and not a universal succession, which need not share the destiny of the rest of the estate, then the *lex domicilii* cannot dispose of it, because the direct right in individual things is always subject to the *lex rei sitæ*,<sup>6</sup> and the estate cannot be all combined into a universal succession, unless the *lex domicilii* and the *lex rei sitæ* agree in uniting it.<sup>7</sup> The situation of the heir who is called by the operation of the *lex domicilii* is exactly the same as if the foreign real estate did not exist at all.<sup>8</sup>

We are now to test the grounds advanced in support of different theories;<sup>9</sup> and in the first place, those that are said to support a rule that the *lex rei sitæ* alone will determine the rules of intestate succession in immoveables, while on the other hand the moveable estate is subject to the *lex domicilii*;

<sup>6</sup> The law of the place where the administrative court lies has nothing to do with the question. The judge is bound to decide who has the right in the foreign estate by virtue of succession, and not to give a right to any one. See, too, Renaud. D. Privatr. § 42, ii. 3.

<sup>7</sup> If, in spite of the fact that the *lex rei sitæ* recognises only a particular succession, real estate situated abroad is to be held at the domicile of the deceased to be part of his universal succession, we must also, e.g., assert that a Government can be called upon to deliver up an inheritance belonging to a foreigner, of which, by virtue of the *jus Albinagii* (now no doubt almost universally obsolete), it is in possession. But as a matter of fact no one has ever thought of doing so, although an action for delivery of a succession so confiscated might be all the more confidently looked for in early times in Germany, since in that country even private persons exercised the right of the *Gabella*.

<sup>8</sup> As to liability for debts, see *infra*, note 43.

<sup>9</sup> In setting out the various theories I must deal with the particular problem of intestate succession, which is the key-stone of the whole subject, since there is not to be found in most of the authorities any exposition of the theory of succession in general.

next those that are advanced to support the theory that the *lex domicilii* exclusively supplies the rule.<sup>10</sup>

<sup>10</sup> I have not been able to find any authority save Kori, *Erörterungen*, iii. p. 19 (see, on the other hand, Wächter, i. p. 304), and the dissertation by Zollius (*de preferentia statutorum discrepantium*), quoted in Schäffner, p. 175, who maintains that moveable succession is subject to the *lex rei sitæ*, a view which is totally at variance with all regular intercourse among civilised States, and makes the creditor's security as well as the right of the heir dependent entirely on accident (see, on the other hand, Savigny, § 376; Guthrie, p. 275-56). The doctrine which many express, that the law of succession is a real statute, is modified by the fiction which they presuppose, that moveables are situated at the domicile of the ancestor (see *supra*, § 59-60). The *Jus Asdomicum* mentioned by Dutch writers, which was in former times recognised in some parts of Holland, and by which intestate succession in moveables was regulated by the law of the place where the ancestor died, had reference only to the inhabitants of these provinces (P. Voet, *de stat.* ix. c. 1, § 9; Vinnius, *ad Just.* iii. 5), and does not contradict the notion of a universal succession. The place of death is substituted for the place of domicile. When foreigners are recognised as having legal capacity, and the *Jus Albinagii* disappears or dwindles into a duty upon succession, we hear of nothing but the rule of succession in moveables recognised by the *lex domicilii*. Savigny's view, that it is only a milder form of the *Jus Albinagii* to determine the succession in moveables by the *lex rei sitæ*, may be disproved historically. Nor can it be urged to disprove that the older writers held the theory of a universal succession, that by their views even moveables could by appointment of the testator have a permanent seat assigned to them as much as immoveables, and so be like them subjected to the *lex rei sitæ* (Mevius, in *Jus Lub. prol. qu.* 6, § 20-4); Carpzovius, *Defin. forens.* iii. const. 12, def. 13); what they there treat of is the moveable pertinents of real property—*e.g.*, the stocking of a farm. [By the law of Bavaria intestate succession, both in moveables and real estate, is regulated by the *lex rei sitæ*, but with this will be combined the law of the residence or actual domicile to determine in what cases it shall apply. The American courts, too, have held that where an estate consists of property, debts, and claims situated in different States, the sum of assets and liabilities is separately made up in each State, the debts existing in any particular State being deducted from the assets situated there, and the creditors having no claim upon assets situated in another State, at least *primo loco* (*Burbank v. Payne*, i. A. 15, 1865; *Atkinson v. Rogers*, xiv. A. 633, 1859). By the law of England the personal property of a deceased person cannot lawfully be possessed or sued for without confirmation in England (Westlake, § 57, p. 91), and in the United States the executors of a foreigner must obtain confirmation in every State where they propose to recover or administer property, *Chiapelle v. Couphey*, 8 L. 85. Confirmation in Scotland is also required by Scots law to give a title to administer property in moveables situated there. Where a grant of administration has been made in England, even although that be merely auxiliary to a foreign grant, the English courts will allow any

In the first place it is urged in favour of the general application of the *lex rei sitæ*, that the sovereignty of the State where the property lies cannot suffer any foreign law to be applied to determine the succession to it. But moveable property, so long as it is in the territory of any State, is subject to its sovereignty as much as immoveable. But since in spite of that it is not proposed to apply the *lex rei sitæ* to moveables, the attempted inference must fail. The *lex rei sitæ* may shut out the application of foreign laws of succession; but that these should really be shut out, it must be distinctly shown that the *lex rei sitæ* means to do so.<sup>11</sup> This is said to be shown by the fact that the law regulating succession has most strongly in view the property concerned, the destination of which it is to fix. But it might as well be said that these laws of succession settle what persons are to take the succession, and against what persons the creditors of the deceased are to claim. This chain of reasoning is no better than the distinction of Bartolus so often criticised by the older authorities (cf. *supra*, § 4).<sup>12</sup>

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creditor to seek his remedy in England against the English assets, so that an administrator in such a case cannot in safety pay over the estate to the foreign heir until all claims of debt are discharged (*Preston v. Melville*, viii. Cl. and Fin. 1).]

<sup>11</sup> See to the opposite effect, Mittermaier, in the *Zeitschrift für Rechtsw. des Auslandes*, vol. ii. p. 272: "The public interest of a State, in which a real estate is situated, can go no further than to require that every person who seeks a real right in that estate shall observe the provisions under which alone the *lex loci rei sitæ* recognises such rights. . . . But it is an empty question to ask what public interest is concerned in determining whether A, who lives abroad, or B is to take a real estate in Baden as heir of C." Cf. Wächter, ii. p. 198.

<sup>12</sup> For the *lex rei sitæ*: Bald Ubald, in L. 1, C. de S. Trin.; Molinæus, in L. 1, C. de S. Trin.; Argentæus, No. 24; Burgundus, ii. 16; Rodenburg, ii. 2, § 1; Abraham a Wesel, de Connub. bon. Societate, tract i. 1, No. 118; Christianæus, Decis. Tris. ii. dec. 4, No. 2, iv. 8, defin. 7; Petrus de Bellaper-tica, in L. 1, C. de S. Trin.; Petr. Peckins, de Test. Conjug. iv. c. 28, No. 8; Vinnius, Select Jur. Quæst. ii. c. 19; Colerus, de Process. Execut. i. 3, No. 230; P. Voet, ix. 1, No. 3; No. 50; Mevius, Decis. ii. 99, and Jus. Lub. proleg. qu. 6, § 10; Everhard. jun., Consil. vol. ii. cons. 32, No. 10; Consil. xxviii. No. 78; Mynsinger, Observ. Cent. v. obs. 19; Cocceji, Defund. vii. 14, 19; Carpzov. Defin. for. P. iii. const. 12, def. 12; Ziegler, Dicastice Concl. xv. No. 28; J. Voet, de Stat. § 21, and in Dig. xxxviii. 17, No. 35; Boullenois, i. p. 223; ii. p. 383; Hofæker, Princip. § 140; Ricci, p. 550-51; Hauss, de

It has been attempted, in the first place, to find a foundation for the opposite view in this, that the law of intestate succession merely expresses what may be presumed to be the will of the deceased: further, that it must be assumed that the deceased knew the law of his own domicile, and in dying without executing a will had that law before his eyes, and that it therefore must rule the disposition of his whole estate.<sup>13</sup> But it is quite incorrect to refer the rules of intestacy to the presumed will of the testator: a proof to the contrary is the existence in Roman law of heirs that must be recognised<sup>14</sup>—a provision by which an order of succession is introduced which not merely runs counter to the presumed will of the deceased, but is contrary to his plainly expressed will: a further proof is that by older Germanic law testaments and dispositions *mortis causa* were not known, and the ancestor could not as a rule defeat the rights of his nearest heirs in heritage without their consent, even by a disposition *inter vivos*.<sup>15</sup>

Savigny modifies this reasoning in this respect, that he does not seek to establish the order of intestate succession upon what may be presumed to be the wish of particular persons for their own individual circumstances, but bases it upon a general presumption to which the law of each different territory gives a different expression, according as it conceives the nature of the relations of the various members of a family to require. In this general sense, however, every rule of law rests upon what it is reasonable to suppose is the wish of the person concerned. There is no peculiarity or

Princip. p. 36; Kori, Erörterungen, iii. p. 19; Mailher, de Chassat, No. 58; No. 292; Wheaton, § 81, p. 109; Fœlix, i. § 66, pp. 143-44; Burge, iv. p. 154; Story, § 483 (and the practice in England and the United States); Demangeat on Fœlix, i. p. 144. The passages cited from the Roman law, L. un. l. ubi de hered. 3, 20, Nov. 69, cap. 1, deal only with jurisdiction, and prove nothing as to the application of the local law of the thing.

<sup>13</sup> So, too, Bartholom. de Saliceto, in L. 1, C. de S. Trin. No. 14, and in more recent times, Glück, Intestaterbfolge, pp. 159-64; Gunther, p. 733.

<sup>14</sup> This law is founded upon the law of the succession of such heirs *ab intestato*. According to the theory given above rules of succession against the will of the testator must depend upon a rule of succession which proceeded from his own will.

<sup>15</sup> Cf. Walter, Rechtsgeschichte, ii. § 469. See, on the other hand, Schäffner, p. 171; Beseler, ii. p. 523.

characteristic specially belonging to the law of succession, and that view will not support the application of the *lex domicilii* to that law unless the *lex domicilii* is also to be applied to influence every rule of law.

Further, the application of the *lex domicilii* cannot be supported on the ground that the law of succession depends upon the personal properties of the individuals concerned, and is, in fact, a law of status, or an enlargement of the personality of the ancestor.<sup>16</sup> There is nothing to show either that the law of succession is part of the law of the ancestor's status, or that anything affecting status is, as a rule, to be settled by the *lex domicilii*: again, all rights may be represented as constituting an enlargement of personality.<sup>17</sup> The *lex domicilii*, therefore, would have to be applied in every case.<sup>18</sup>

But, in the third place, there is no more force in the assertion that the State in laying down rules of succession has persons only, and not property, in view; and that the laws of succession, therefore, affect only the subjects of a State, but affect them in all questions pertaining to their property.<sup>19</sup> It might just as reasonably be said that these laws affect things only, and that the *lex rei sitæ* should therefore be applied.

The proposition, however, that the succession of an heir is an universal succession, and that in consequence the *lex domicilii* must be applied, is fully established in the Roman law and the systems that follow it.<sup>20</sup> All that prevents it from being a general rule is that there may actually be systems resting, as we find in the case of the law of England at the present day, upon an advanced stage of civilisation, which do not recognise the principle of universal succession with reference to immoveable succession.<sup>21</sup> Savigny, to get rid of this objection, argues that the law of inheritance and universal succes-

<sup>16</sup> Maurenbrecher, i. § 144; Phillips, i. pp. 190-01.

<sup>17</sup> Savigny, i. p. 334.

<sup>18</sup> See to the contrary, Wächter, ii. p. 196.

<sup>19</sup> Wächter, ii. p. 198.

<sup>20</sup> This ground is taken by older writers—*e.g.*, Barthol. de Saliceto, in L. 1, C. de S. Trin., and is urged by most of the more modern German authors.

<sup>21</sup> Cf. Wächter, ii. p. 197.

sion are identical ; the latter merely supplies the form which the other must take, and the technical language in which it must be expressed, but is no peculiar rule of Roman law. The true state of the case, he says, is rather that the law of succession has, in the positive laws of many States, remained stationary at a lower grade of development, while in Roman law it was at an early date subjected to the treatment which every positive law must inevitably attempt to reach.<sup>22</sup> No doubt, as we have noticed, it is true that singular succession in its pure form seems to be irreconcilable with an advanced stage of civilisation, and is not found among any civilised people ; but the combination of a universal and a singular succession, such as is recognised in older German law, and in the law of England at the present day,<sup>23</sup> may exist under certain modifications in conformity with the claims of modern commerce and intercourse, and cannot be dismissed as an imperfect theory of legal relations.<sup>24</sup>

Objection, too, has quite properly been taken to the exclusive application of the *lex domicilii*, on the ground that there are kinds of real property in reference to which commonly received theories allow the *lex rei sitæ* alone to be applied ;<sup>25</sup> e.g., feudal and entailed holdings, and in many countries the ancestral property of noble families, manorial lands, and peasant proprietories. Savigny cannot refuse to recognise the force of this objection.<sup>26</sup> Feudal and entailed estates are similar, he says, to the Roman usufruct ; they do not belong to patrimonial estate, and so do not fall under

<sup>22</sup> § 376 ; Guthrie, pp. 274 and 278.

<sup>23</sup> Succession in real property is by the law of England quite separate from that in moveables. The law of succession is looked upon as a mere *modus* of acquiring property, and Blackstone speaks of succession in the same book in which he treats of sale and prescription. The heir in heritage was in earlier times not liable, even subsidiarily, for all debts—i.e., he was not liable for simple contract debts. In modern times this has been altered, first for persons carrying on trade, and then for all persons. The heir cannot, however, be answerable for more than he took as heir. Cf. Stephen, i. chap. xi. pp. 429-30, and ii. chap. vii. p. 201.

<sup>24</sup> Cf. Gerber, § 248, note 2.

<sup>25</sup> P. Voet. 9, 1, §§ 5, 6 ; Rodenburg, ii. 1, C. 5, § 17 ; J. Voet, Digressio de feudis ; Seuffert, Comm. i. p. 258, note 17 ; Boullenois, i. pp. 880-81.

<sup>26</sup> § 376 ; Guthrie, pp. 278-80. So, too, Holzschuher, i. p. 81.

succession ; these are special legal categories applying to particular portions of real estate, and as such, therefore, must be governed in every case by the *lex rei sitæ*. The special treatment applied to other special kinds of landed property rests upon political considerations, which are the object of the laws determining the order of succession in them. It is not the most appropriate destiny which, as in the case of the ordinary law of succession, is to be given to the estate of deceased subjects ; but the object sought to be attained is the preservation of the estate, specially by the exclusion of daughters, by regulations as to indivisibility, and as to the right of the eldest, or of younger sons to succeed. But, although by modern law entails may be regarded as a kind of *usufructus*, the same thing can by no means be said of feudal holdings. The right of the vassal in his feu is something far more than a right of usufruct, and the order of succession in feus is in reality nothing but the old German order of succession, modified by the rights of the overlord. Succession in a feu transmits the whole rights of the property to the person who takes ;<sup>27</sup> he does not take over all the debts of his predecessor, but those only which are specially connected with the feu, and the principle is just the principle of old German law as to succession in real estate. As regards the second kind of estates, we have there the old German law of succession pure and simple, which is only now to be found in these holdings, although, no doubt, in the case of entailed property, it exists with certain modifications introduced by Roman law.<sup>28</sup> This is the explanation of the application of the *lex rei sitæ* ; there is no need to assume a political end. No doubt in all laws we may fancy that there is some political end, but yet we do not on that account always apply the *lex rei sitæ*. If, for instance, in a country where the principle of an universal succession and the common Roman law of succession are recognised, the eldest son must in all circumstances get three-fourths of the whole property,

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<sup>27</sup> Cf. Gerber, § 266.

<sup>28</sup> Nor can the application of the *lex rei sitæ* be grounded on the argument that we are here concerned with a prohibitive law (see Glück, Pandects, i. pp. 292-93). Cf. *supra*, § 33.



there can be no doubt that this law has as its object the maintenance of a large estate, particularly a large landed estate in a family, since there never could be many people in a position to leave any but their eldest son a landed estate if that eldest son is to take three-fourths of the whole property.<sup>29</sup> But yet such a law cannot apply to a foreigner, who happens to possess an isolated estate in that country ; its object is to regulate the whole property, and that cannot be done unless the personality, by which the property is held together, belongs to that State.

Lastly, we have proof from history of the accuracy of the theory we have adopted—viz., that neither the *lex domicilii* nor the *lex rei sitæ*<sup>30</sup> should rule all cases—in this fact, that those authors who are more familiar with the principles of German law favour the *lex rei sitæ*, and those who have Roman law in view, the *lex domicilii* ; while there are many adherents of the latter theory, who require that the *lex rei sitæ* should be applied in such exceptional cases as where they have to deal with rules of German law, such as the exclusion of daughters from succession to heritage or the rules of primogeniture ; a result which shows a practical instinct, although they defend it upon erroneous grounds, such as that they have here to deal with a *statutum odiosum*.<sup>31</sup>

In Germany, at the present day, the principle of an universal succession found in Roman law has been adopted in the various particular systems,<sup>32</sup> and with it the view, which

<sup>29</sup> Especially in the law of succession is it always possible to figure some political object. See Demangeat, i. p. 145. A rule of particular succession is no doubt best adapted to ensure that a particular estate shall be kept in a family or kept intact. But yet in such cases it is the legal form and not the political end which that form seeks to attain that is the ground upon which we apply the *lex rei sitæ*.

<sup>30</sup> The *Sachsenspiegel* (Landrecht, i. 30), has logically laid down this rule : "*Jewelk inkomen man untveit erve binnen dem lande to sassen na des landes, rechte, und nicht na des mannes, he si beier oder svaf oder franke.*"

<sup>31</sup> See, for instance, Bartholom. de Salic. as cited. Albert Brun. de Stat. art. 6, § 2, 16 (in den *Tractatus ill Iet de statutis*, fol. 165). Bouhier, chap. 24, No. 159, chap. 30, No. 1. Alderanus Mascardus, Concl. 6, No. 100.

<sup>32</sup> Beseler, ii. p. 489 ; Gerber, § 249, make an exception only in the case of the holdings mentioned above.

now prevails, that the *lex domicilii* should always rule.<sup>33</sup> In France, before the *Code Napoléon* was published, the older German law had been retained in the *Coutumes* of the northern provinces,<sup>34</sup> and that will account for the preponderating weight of authority in favour of the *lex rei sitæ*; but there is no justification left for such a view since the publication of the *Code Napoléon*,<sup>35</sup> which, like the *Allgemeine*

<sup>33</sup> Besides those already mentioned, the following favour the *lex domicilii*:—Alb. de Rosate, Lib. i. qu. 46, § 8; Alexand. Tartagn. Imol. Consil. Lib. v. cons. 44; Puffendorf, Observat. vol. i. obs. 28, § 5; Boehmer, I. E. Protest. iii. tit. 27, § 15; Seuffert, Comment. i. p. 258; Göschen, Civilr. i. p. 112; Holzschuher, i. p. 80; Wening Ingenheim, § 2; Mühlenbruch, § 72; Reinhardt, i. 1, p. 31; Mittermaier, § 32; Unger, i. p. 199; Bluntschli, i. § 12, 5; Oppenheim, p. 395; Beseler, i. p. 153; Eichhorn, § 36; Gerber, § 32; Ross-hirt, Civilr. § 6; Thöl, § 79; Judgment of the Supreme Court at Berlin, 4th Oct. 1844 (Decisions 10, p. 177); Supreme Court of Appeal at Lübeck, 10th Dec. 1828 (Seuffert, 4, p. 165); 28th Feb. 1857 (Frankfurt Collection, 3, p. 112). (See, too, the judgment of the same Court reported by Seuffert, 2, p. 447)—It is the domicile obtained with approval of the Government, and not the place of political citizenship that is to be considered. Judgment of the Court of Cassation at Paris, 7th Nov. 1826 (Sirey, 26, 1. p. 350-03); Hagemann, 6, p. 140 (Judgment of the Supreme Court of Appeal at Celle, 23d Dec. 1817). It is the actual domicile, and not the nationality or home of the person concerned that is to rule, according to a decision of the Supreme Court of Appeal at Lübeck, 21st March, 1861 (Seuffert xiv. p. 164). See, on the other hand, *supra*, § 30, note 22.

<sup>34</sup> From this comes, as Bouhier, chap. xxiii. No. 12, chap. xxvi. No. 71, with some sadness says, the *ancien préjugé enraciné* of the older French authors, *que toutes les coutumes sont réelles*. Bouhier, as President of the Parliament at Dijon, stood closer to the Roman law.

<sup>35</sup> Cf. Code Civil, arts. 732, 870, *et seq.*; Prussian A. L. R. i. 2, § 34, i. 9, § 350, i. 17, § 127 *et seq.*; Austrian A. G. B. §§ 532, 547-78. In opposition to these provisions, rules such as those of the Code Civil, art. 3, § 2, "*Les immeubles même ceux possédés par des étrangers, sont régis par la loi française*," Prussian A. L. R. § 23, and Austrian A. G. B. are applicable merely to real rights in particular parcels of heritage (the reverse is assumed in a judgment of the Cour Royale of 7th April, 1833, and by Bornemann, Prussian L. R. i. p. 53; see, on the other hand, Koch on §§ 23 and 32 of the Introduction to the Prussian L. R.), for the law makes a marked distinction between the incorporeal right to the succession as a *universitas*, and the right to particular corporeal articles. It is a very unfortunate idea upon which the second article of the French Statute of 14th July, 1819, rests: that article, while it abrogates the 726th article of the Code Civil by which foreigners are declared incapable of succession, goes on to provide "*dans le cas de partage d'une même succession entre les cohéritiers étrangers et français*,

Preussische Landrecht and the Allgemeine Oesterreichische Gesetzbuch, consistently adopts the principle of a universal succession : the only explanation is that the old mode of thought is still cherished, while no weight is given to the legislative changes.<sup>36, 37</sup>

Schäffner rejects the view we have adopted, although he admits it to be logically correct, and announces that he is in favour of the *lex rei sitæ*, because, on the one hand, so simple a thing as the law of intestate succession should not be made dependent upon such distinctions ; and, on the other hand, because, if the *lex domicilii* is to be the rule, there must be a new exception when we have to deal with a prohibitory enactment. The latter difficulty has no application to the

*ceux-ci prélèveront sur les biens situés en France une portion égale à la valeur des biens dont il seraient exclus, à quelque titre que ce soit, en vertu des lois et coutumes locales,"* and, confusing what is termed formal reciprocity with material reciprocity, it invades a department of the law which both the spirit and the reason of French law give over to the foreign law, whether the *lex domicilii* or the *lex rei sitæ* is to be applied to it. The rule would be just and adequate if it were limited to the case of French people who should, as such, be exposed to disadvantages abroad. This rule does not contradict in the least the view we have adopted, because if it is properly interpreted according to the plain sense of the words used, it must be applied to moveables just as much as to immoveables (Cf. Demangeat as cited, the judgment of the Court of Cassation at Paris, there quoted of date 21st March, 1855, and Gand, No. 310), and seems to be nothing but an exclusive privilege of French co-heirs, as appears from a judgment of the Court of Cassation at Paris, 30th March, 1850, where there was a concurrence of foreign co-heirs, and the *lex domicilii* was applied to regulate the real estate in France. [Cf. *infra*, p. 480, note.]

<sup>36</sup> A judgment of the Court of Cassation at Paris, 14th March, 1837, (Sirey, 37, 2, pp. 195-99), proceeds directly upon the older French practice. Both courts of first instance had in this case given a contrary decision.

<sup>37</sup> In Austria, by a decree of the Court of 22nd July, 1812, and still more plainly by a law of the 9th August, 1854, it is distinctly recognised as the duty and the right of the Austrian courts to take up the regulation of the real estate of a foreigner, and the *lex rei sitæ* is thus applicable by direct legislative enactment. The most puzzling complications must result from this confusion, for the idea of a universal succession is deeply rooted in the Austrian Statute Book, see § 531. (Law of 9th August, 1854, § 2 : "The administration of the real property of a deceased foreigner, which is situated in Austrian territory, belongs entirely to the Austrian courts, to which the law assigns such questions where its own citizens are concerned, and therefore the rights of all concerned must be attended to in accordance with Austrian law." See Unger, i. p. 199.)

view we have adopted, and the former we can meet by remembering that the question, whether the *lex rei sitæ* regards succession as universal, is easily answered; and, where the *lex domicilii* and the *lex rei sitæ* both regard it as universal, it is only when we propose to apply the *lex rei sitæ* that difficulties arise. Savigny (§ 378; Guthrie, p. 288) gives the following illustration with reference to this matter:—An inhabitant of Berlin dies intestate, leaving a widow and several near relations of different degrees; the estate consists of landed property near Berlin and in Silesia, a house in Ehrenbreitstein, and a house in Coblenz; besides that, the deceased has many personal debts, which, of course, affect all parts of his estate. According to the theory of our opponents, no fewer than four different systems of law must regulate the succession to these parcels of real property, and each of them may give its parcel to a different heir; there would, in truth, be four inheritances, regulated in the Mark Brandenburg by the Joachima of 1527, by which the widow has right to one half of the combined estate of herself and her husband,—in Silesia by the Allgemeine Landrecht, in Ehrenbreitstein by Roman law, and in Coblenz by French law. If, on the other hand, universal succession is not recognised by the *lex domicilii*, or, it may be, by the *lex rei sitæ*, and, while therefore some debts are seen to be a special burden upon the real estate, while others have nothing at all to do with it, the greatest confusion would arise if the *lex domicilii* were generally applied, just in the same way as if, in the case of a feu, feudal and allodial debts were all thrown together.<sup>38</sup> No doubt, if we found a case—which, according to the principles of Germanic law explained above, could only be counted an abnormal state of matters—where there was no universal succession, but yet the debts fell equally upon the moveable and real estate, then, in this case, the only expedient left would be a taxation and apportionment; but that would be

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<sup>38</sup> Cf. Vattel, ii. ch. 8, § 100: “*Les biens qu’il (l’étranger) délaisse en mourant, dans un pays étranger, doivent naturellement passer à ceux qui sont héritiers. Mais cette règle générale n’empêche point, que les biens immeubles ne doivent suivre les dispositions des lois du pays où ils sont situés.*” Renaud, i. § 42, ii. 3; and Kierulff, 79, 80, take our view.

due not to any error in our theory as to the collision of legal systems, but solely to the individual territorial system.

The following cases may serve to illustrate our meaning. By the law of Scotland heritable bonds, which are obligations for payment of money secured by hypothecating or creating another real right over heritable estate,<sup>39</sup> fall upon this estate primarily, while in England the law makes the moveable estate principally liable for the payment of such obligations. If then a domiciled Englishman who owns real estate in Scotland has granted such an heritable bond over it, our theory will make the Scottish heir in heritage answerable without recourse against the English representative in moveables. By the terms of the bond the obligation is closely attached to the heritable subject, and becomes a real burden, which has the character of a personal debt only in a subsidiary sense. It has been so decided in England, upon what is certainly a singular ground—viz., that the disability of the Scottish heir to require the heirs in personality to relieve him of the debt follows him to England.<sup>40</sup> Conversely, if the real estate is by the *lex rei sitæ* not answerable for payment of the debt, this is explained by the fact that the heir in heritage was originally only responsible for debts which had been created a real burden upon the estate, but that in later times he took the position of a cautioner, himself bound along with the principal debtor. He has, therefore, recourse against the foreign heir *in solidum*, even although the foreign law would allow the debt to attach to both moveable and immoveable estate; just as the successor in a feu, who pays what is subsidiarily a debt upon the feu, has recourse against the heir who takes the allodial estate.<sup>41</sup>

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<sup>39</sup> Story, § 366.

<sup>40</sup> Story, §§ 487-78.

<sup>41</sup> In the result, Story, § 489c., and Pothier des Successions, ch. 5, § 1; Burge, ii. p. 85, iv. pp. 724-25, 732-33; Merlin, Rép. Dette. § 3, iv.; Bouhier, ch. 29, No. 59, ch. 24, No. 186, are agreed. Story, § 486, reports the following case:—"A person domiciled in England died intestate, leaving real estate in Scotland. The heir, who was one of the next of kin, claimed a share of the personal estate. To this claim it was objected that by the law of Scotland the heir cannot share with the other next of kin in the personal property of an intestate except on condition of collating the real estate; that is, bringing it into a mass with the personal estate, to form one common subject

The matter is quite otherwise if there is a valid testament in existence, since the question there is which of the heirs the testator intended should bear the debts.<sup>42</sup>

The question whether any particular thing is to be held moveable or immoveable is to be determined by the *lex domicilii*, if that is the law that regulates the succession, but by the *lex rei sitæ* in the opposite case ;<sup>43</sup> in the latter case the question must be whether it is to be held to be a pertinent of some other thing, in which case of course the *lex rei sitæ* must be applicable.

Capacity to take is, as a part of legal status and capacity, according to the principles expounded above, § 45, subject to the law which in other respects determines questions as to the succession—*i.e.*, the *lex rei sitæ* or the *lex domicilii* of the deceased.<sup>44</sup> Some authorities<sup>45</sup> make the *lex domicilii* of the heir or of the legatee the rule ; but, on the one hand, this rests upon a confusion between the capacity to act and legal status, which cannot be approved of ; and, on the other hand, upon the theory that the voluntary entry into a religious order, which forbids those who come under it to acquire anything by inheritance,—the case which is generally taken as illustrative of the principle,—must be held to be a renunciation of the succession.<sup>46</sup>

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of division. It was determined, however, that he was entitled to take his share without complying with that obligation." This decision, too, is right. The Scotch and English estates form two distinct and separate subjects, which stand to one another just as the succession to two different persons would.

<sup>42</sup> Cf. *infra*, § 110, and Story §§ 528-29, 490-91.

<sup>43</sup> *Supra*, § 62. Most authorities make the *lex rei sitæ* the general rule here (Story, § 447 ; Beseler, i. p. 154). This is not quite accurate ; if, for instance, the succession is universal both by the law of the domicile and the *lex rei sitæ*, but the *lex domicilii* provides that the real estate must go to some privileged heir for a consideration, the *lex domicilii* must decide whether any consideration is to be given for any particular thing.

<sup>44</sup> Hert, iv. 13, 50 ; Bartolus, in L. 1, C. de S. Trin, Nos. 38, 40 ; Argentæus, Nos. 17, 18 ; Burge, iv. pp. 155, 217 ; Oppenheim, p. 396 ; Judgment of the Supreme Court of Appeal at Kiel, 2nd. Feb., 1853.

<sup>45</sup> Holtzschuher, i. p. 80 ; Unger, i. p. 200, note 61. Boullenois, i. p. 66, proceeds quite illogically ; he says that the *lex domicilii* can make a man incapable of taking anywhere, but cannot give him capacity to take everywhere.

<sup>46</sup> See Hert, iv. 42. Walter, § 43, makes this distinction : " By the law of his domicile a monk cannot take by succession ; this has no effect in the

## Note S, on § 107.

[The law of the domicile of the deceased, or the deliverance of its courts, is universally regarded as the law that shall regulate the rights of succession and administration in moveables belonging to him. In England the right of administration and the beneficial interest are both so determined—Westlake, §§ 59 and 112, pp. 92 and 124; subject to this exception, that where no executors are appointed by the will, and the grant of administration is therefore to be made to those who are interested in the beneficial succession, the English practice will be followed in selecting the grantees, subject to referring the question of beneficial interest to the law of the deceased's last domicile (Westlake, § 69, p. 96; Wharton, § 610). The law of America proceeds on the same principles, as does also the law of Scotland (Alexander's Practice of the Commissary Courts, p. 44). As to the liability of the assets in one country for debts due to foreign creditors, cf. *supra*, note on p. 449. The rule of the *situs* is by all of these legal systems recognised in questions of succession to real property.

Domicile and not nationality is in France regarded as regulative of the right of administration and of succession,—“There is no law to prevent a foreigner settled in France, although he may not have obtained a license such as to confer upon him the capacity for civil rights, from acquiring and retaining a domicile of fact, that draws with it certain practical consequences—*e.g.*, the regulation of succession” (C. de Cassation, *Specht v. Specht*, 7th July, 1874). The mere fact of death in France will not suffice if there is no *animus remanendi* (Le Baudy, Trib. Civ. de la Seine, 25th June,

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country where the institution of monasticism is positively rejected, but it has where it is known, although this incapacity may not be attached to it.” Savigny (§ 377; Guthrie, p. 283) makes the capacity of the heir or legatee dependent on the law of his domicile. But he makes exceptions in cases where there are laws of a coercitive character—*e.g.*, civil death or disability to take on account of heresy, and admits the *lex fori* in such cases as the rule. But if any laws can be held coercitive, the laws as to incapacity to inherit must be; and therefore in Savigny's view the *lex fori* must be the general rule.

1880). (Cf. also *Poupardin v. Garforoukel*, 14th March, 1879, Trib. Civ. de la Seine.)

A residence for many years, the possession of a trading establishment, and marriage in France to a Frenchwoman, have together been held sufficient to constitute a French domicile (*Becker v. Chantreuil*, Bourdeaux, 19th Aug. 1879). Such a domicile will give right to the French courts to regulate the administration of real estate situated abroad, and the French courts will recognise the right of foreign administrators to deal with real estate in France (*Vierry Miez, C. de Besancon*, 23rd July, 1875). As a means of preserving estate situated in France the French courts will nominate a judicial factor during the dependence of a litigation in the courts of another country as to the right of succession to the estate, even although the estate be moveable and the domicile of the deceased be abroad (*Falrez v. De Gonzo*, Trib. Civ. de la Seine, 31st March, 1876).

In Italy residence for any considerable time will suffice to place the whole succession, heritable and moveable, under Italian law as an universal succession; no such intention of permanent residence as is required to constitute a domicile, in the English sense of that term, is necessary (Court of Appeal at Lucca, 18th June, 1880). It will be remembered that in questions of status and capacity the law of Italy holds the principle of nationality to be regulative.]

#### *B. Mortis Causa* DEEDS AND CONTRACTS AS TO SUCCESSION.

### § 108.

*Mortis causa* deeds and contracts as to succession are in truth operations of the will of the testator upon the statutory order of succession, whether it be that the legal heirs are thereby entirely excluded, and an arbitrary series of heirs instituted, or that subordinate provisions modify in isolated points the statutory order of succession, which would but for them take effect. The result of that is, that testate succession is admissible when the law which regulates the succession *ab intestato* permits this operation to take effect, and so *mortis causa* deeds will depend upon the *lex domicilii* of the testator or the *lex rei sitæ*, according as the



law which would regulate intestacy speaks of a universal or a particular succession. The question of capacity to make such a deed—*i.e.*, the recognition by law of a deliberate settlement of succession, expressed in some particular form—has been left to the determination of the *lex rei sitæ* or the *lex domicilii*, according as the author dealing with the subject holds that intestate succession is determined by the one or by the other.<sup>1</sup>

Some authors, however, moved by the expression “capacity” (*habilitas, capacitas, capacité*), have been led illogically to apply the *lex domicilii* in all questions of this class,<sup>2</sup> although in other respects they are in favour of the *lex rei sitæ*. Some assistance has no doubt been given to this tendency by the fact<sup>3</sup> that, on the one hand, if the territorial system which regulates the succession makes the capacity to execute a will dependent upon freedom from paternal control, the *lex domicilii* must, of course, determine whether this is the case or not; while, on the other hand, many authors go so far as to apply the *lex rei sitæ* to the collision of systems of law, both of which treat succession purely as an universal succession, and thus make the will, which in this case from its very

<sup>1</sup> The following support the *lex rei sitæ* :—Bartolus, Nos. 38-41; Burgundus, i. 45; P. Voet, de Stat. iv. c. 3, § 12; Huber, § 15; Hert, iv. 22; Gaill, Observ. ii. observ. 124, No. 12; Stockmans, Decis. Brabant. decis. 125, No. 10; Rodenburg, ii. 5, § 7; Vinnius, Select Juris. Quæst. ii. c. 19; Cocceji, vii. § 4; Merlin, Rép. Testament. i. § 5, art. 2, No. 2; Ricci, pp. 544-45; Ziegler, Dicast. Concl. 15, § 21; Burge, iv. pp. 217-20; Story, §§ 474 and 465; Bornemann, Preussisches Civilr. i. p. 13.

The following the *lex domicilii* :—Hofæker, De eff. § 24; Molinaus, in L. 1, C. de S. Trin.; Bouhier, chap. 24, No. 91; Alder. Mascardus, Concl. 6, No. 42; Holzschuher, i. p. 80; Wächter, ii. p. 365; Thöl, Einl. § 79; Savigny, § 377; Guthrie, p. 282. It is indisputable that the capacity of testing on moveables must be determined by the *lex domicilii*. See Burge, iv. p. 580; Seuffert, Comm. i. p. 259.

<sup>2</sup> For instance, Bald Ubald, in L. 1, C. de S. Trin. No. 79; D’Aguesseau, Œuvres, iv. p. 539; Fœlix, i. § 88, pp. 198-99 (Demangeat on this passage, and i. pp. 64-5); Schäffner, p. 180; Hugo Grotius (Epistolæ. Amstelod. 1687, No. 464); Boullenois, i. pp. 486-88, 714. Some of these authors with this further absurdity, that if a person is incapacitated by the *lex domicilii*, he must be held to be so everywhere; but if, on the contrary, the *lex domicilii* give him capacity, while the *lex rei sitæ* denies it, the testament is of no effect as to the real estate in question (“the *capacité de tester* is *personnelle réelle*”).

<sup>3</sup> Cf. Merlin, Rép. Testament, sect. 1, § 5, art. 1, iii.

nature ought to regulate the entire succession, settle nothing more than the succession of a part.

Capacity to act is not to be confused with capacity to execute a testament. The laws which set limits upon the former exist solely for the advantage of the *incapax*, but laws as to testamentary incapacity have in view the security and the advantage of the heirs *ab intestato*.<sup>4</sup>

That this view is false is, lastly, demonstrated by the fact that, if one law is to regulate testamentary capacity and another intestate succession, then we may have testacy and intestacy co-existent in the same instance; for if intestacy and its rule of succession are not excluded, they must receive effect, and nothing can exclude them except the law which is to regulate their operation.

When German systems come into conflict with the Code Civil, or when one of these systems is in conflict with another,<sup>5</sup> our theory will make the *lex domicilii* provide the general rule; while, if one of these systems comes into conflict with the common law of England, the *lex rei sitæ* must determine questions as to the succession to real property.

If a change of domicile has taken place, the law of the last domicile is that which rules, in so far as the *lex domicilii* supplies the rule;<sup>6</sup> but a testament which is bad from the

<sup>4</sup> This will suffice to refute the argument attempted by Demangeat (i. p. 65), which sets on the same footing the provisions of the Code Civil in articles 903-04, and the provisions as to incapacity to act. The minor, for instance, in making a will, may damage his heirs; he cannot damage himself. In a judgment of 30th August, 1820 (Sirey, 20, 1, p. 447), the Court of Cassation of Paris declared that the article 904 was a *statut personnel*, because it stands in a chapter entitled, "*De la capacité de disposer ou de recevoir par testament*."

<sup>5</sup> There are, for instance, differences between the Prussian A. L. R., which gives the prodigal a limited capacity of testing—viz., over one half of his estate—(i. 1, 13, i. 12, § 37), and the common law of Rome, which declares him quite incapable; in the same way, between the Prussian A. L. R. ii. 2, § 201, i. 12, § 16, and the law of Hamburg (Baumeister, ii. p. 51) on the one side, which give children *in familia* the right of testing, and the common law of Rome on the other side, which denies it to them.

<sup>6</sup> If incapacity to execute a testament were a special kind of incapacity to act, the law of the domicile which the testator had when he made it could alone be applied.

beginning cannot be made good merely by a subsequent change of domicile.

That is the result of the following reasoning. If any one is incapable of executing a testament, he cannot test in any form;<sup>7</sup> the testament which he executes is just as invalid as if it were null from some defect in form. In the latter case no one would hesitate to say that it continued to be invalid. This view<sup>8</sup> is supported by analogous provisions of the Roman law which treat of the change of the legal relations of a person under the dominion of the same system of law.<sup>9</sup> If the

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<sup>7</sup> Incapacity to test arose, according to older Roman law, from the incapacity to do the act in which the testament was, as a matter of form, clothed.

<sup>8</sup> Cf. L. 19, D. 28, 1, § 4 J, *quibus modis test. infirm.* 2, 17.

<sup>9</sup> Cf. Savigny, § 377; Guthrie, p. 282. Koch, on § 23 of the Introduction to the Prussian A. L. R.; Burge iv. p. 450; Holzschuher, i. p. 80; Wächter, ii. p. 365, take the same view. Savigny makes a distinction between physical qualities—*e.g.*, age, and legal character. The first only need to be present by the law of the domicile of the testator at the time of the execution of the instrument. This theory rests upon an erroneous application of the rules of Roman law. By older Roman law the deaf and dumb could not test, because these physical peculiarities made it impossible for them to observe the forms then required. In this the Romans were right. It is enough if the testator, at the time of executing the deed, could physically make use of these forms, for in accurate language no one retains the physical power of doing so up to the last moment of life. To insist rigorously upon this as regards physical peculiarities would make it quite impossible to make a testament. It is just the same with the natural gift of capacity of the will in each individual; this, too, no one can keep till death, since in the last moments of life every creature's will fails; and the legal incapacity which the decree of the Prætor imposes on the *prodigus* was held equivalent to natural incapacity. It is otherwise with legal qualities—*e.g.*, independent personality. These may exist till death, and so we can adhere to the logical legal position that they must continue up till that moment. Want of full age certainly falls, however, into the second class, for once attained it is never lost. But as the necessary age for the execution of a deed according to Roman law always remained the same, the Roman jurists had no opportunity of discussing the closely allied question as to the effect of a change in the law of the domicile with regard to the necessary age. The incapacity of the *prodigus*, however, may be treated as a legal fact, although that is not the theory of the Roman law, and the testament executed before the decree of prodigality becomes void, if that were the view taken by the law of the last domicile. In these times we can scarcely have to consider the incapacity of deaf or dumb persons; such questions would fall to be settled by the law that regulates the forms of testaments, since the incapacity here rests upon the failure of these persons to

testator has full capacity by the law of his last domicile and of that which he had at the time he executed the deed, but is *incapax* by the law of some domicile which he has in the interval acquired and lost, his deed must be sustained.<sup>10</sup>

### FORM OF *mortis causa* DEEDS.

#### § 109

The form of the instrument is determined by the same principles. The application, however, of the rule *locus regit actum*, without any distinction between judicial and extra-judicial forms,<sup>1</sup> is established by the force of custom as a law<sup>2</sup> in the sense we have already expounded—viz., to this effect, that it is sufficient to observe the *lex loci actus* or the *lex domicilii*, provided always that there is no doubt about the intention of the testator to make a will. We say it is so established with reference both to real and personal succession in those systems which hold the theory of a universal succession, and with reference to personal succession in all systems.

It is quite consistent and proper that English, Scottish, and American practice—the last in so far as it is founded on the common law of England—should allow no law but the *lex rei sitæ* to affect real estate situated in a country where the English common law prevails;<sup>3</sup> for as we have already seen,

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comply with the necessary forms. This must also be the rule in the case of deaf mutes. The Prussian A. L. R., i. 5, § 171, i. 12, § 120, requires, for instance, a judicial testament. See, on the other hand, as to the different views depending on the common Roman law, Arndt's Pandects, § 448, note 4; Code Civil, arts. 902, 967, 979.

<sup>10</sup> Burge, iv. p. 451; Boullenois, ii. p. 194.

<sup>1</sup> Thöl, § 83, note 4, seems inclined to confine the rule to public testaments. There is, however, no indication of this among the older writers. See, on the contrary, Fœlix, i. § 79, p. 176.

<sup>2</sup> Cf., *supra*, § 36.

<sup>3</sup> The following hold a testament is good everywhere, if it is in accordance with the forms required at the place where it is executed:—Bald Ubald, in L. 1 C. de S. Trin., No. 83; Alb. Brun. de Stat. x. § 56; Alb. de Rosate, L. 1, qu. 46, § 1; Hugo Grotius, *Epistolæ* (Amstelod., 1687 fol.), Nos. 464-67; Rodenburg ii. c. 3, § 1; Christianæus, in *leg. Municip. Mechlin.*, tit. 17, art.

the rule *locus regit actum* does not apply to the acquisition of real rights in particular things.<sup>4</sup>

Many authorities who, in dealing with intestate succession, give absolute authority to the rule of the *lex rei sitæ*, make in this department an exception, and regard the *lex domicilii*

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1, No. 9; Stockmans, Decis. Brabant, decis. 9, No. 1: "*Hodie sine hesitatione judicamus sufficere sollemnitates, quæ obtinent in loco confectionis*;" Bartolus, in L. 1 C. de S. Trin, No. 36; P. Voet, 9, c. 2, No. 1; Mynsinger, Observ. Cent. v. observ. 20, No. 4 (illustrating the practice of the Reichskammergericht); Gaill. Observ. ii. obs. 123, No. 1; Carpzov. Defin. forens. P. iii. const. 6, def. 12, No. 1; Everhard. jun. Cons. vol. ii. cons. 23, Nos. 9, 10, cons. 28, No. 79; Jo. a Sande, Decis. Fris. iv. 1, defin. 14; Cocceji, de Fund. vii. § 1; Seger, p. 24; Mevius, in Jur. Lub. qu. 6, § 43; Petr. Peckins, de Testam. Conjug. iv. c. 28, § 9; Ziegler, Dicast. concl. 15, § 16; Vinnius, ad I. ii. 15, § 14, No. 5; Dion Gothofredus, ad Leg. 20, D. de jurisdict. 2, 1; Vattel, L. ii. ch. 8, § 111; Hommel. Rhaps. Quæst. vol. ii. obs. 409, No. 5; Hert, iv. §§ 23-25; Merlin, Rép. Testament, sect. 2, § 2, art. 6, No. iii., sect 2, § 4, art. 1; D'Aguesseau, Œuvr. iv. p. 637; Ricci, p. 533; Göttingen Faculty of Law (in Böhmer, Rechtsfälle, vol. ii. p. 81); Boullenois, i. p. 422; Titius *Jus. Privatum*, i. c. 10, §§ 34-35; Boubier chap. xxv. No. 61; Cochin, Œuvres, i. p. 545; Mittermaier, § 32, p. 121; Von Grohnan, Anonymous Papers on Holograph and Obscure Testaments, p. 20; Glück, Pandects, i. p. 291; Seuffert, Comm. i. p. 258; Renaud, i. § 42, note 21; Gand, No. 579; Savigny, § 381; Guthrie, p. 322. Judgments of the Supreme Court of Appeal at Wiesbaden, 16th October, 1822 (Nahmer, 2, p. 171); Supreme Court at Berlin, 3rd April, 1857 (Striethorst, 23, p. 353); of the Court of Cassation at Paris, 30th Nov. 1831 (Sirey, 32, 1, pp. 51-58); Wächter, ii. p. 191, 370-71; Schäffner, p. 188, and authorities cited there. The Hanoverian order of 29th Oct. 1822 gives validity to the testamentary dispositions of Hanoverian subjects executed abroad before a foreign court, and in a foreign form. It cannot be inferred from this that the rule "*locus regit actum*," would be excluded, if a legal transaction, which in Hanover must be entered upon in court, did not need that formality abroad.

<sup>4</sup> The following favour the *lex rei sitæ*:—Burgundus, vi.; Cujacius, Consult. No. 3 (but in his Observ. Lib. xiv. c. 12, Cujacius recognises the *lex domicilii*, on the ground of the L. 9 C. 6, 23); Wheaton, § 81, p. 109; Burge, iv. pp. 220, 581; Story, § 474-78. These two last testify to the practice of English and American courts. We can specially appreciate the propriety of the view taken by English jurists in connection with the principles of their common law, which divides every succession into moveables and immoveables, if we remember that, up to modern times, there were two separate forms for wills, according as they dealt with moveables or immoveables, and that the Statute of Wills (7 Will. IV. and 1 Vict. cap. 26) was the first means of introducing one form for both kinds of estate, besides certain privileges given to soldiers and sailors in making testamentary settlements of moveable property. Stephen, i. pp. 591-93, ii. p. 188.

or the *lex loci actus* as regulative in every case. The explanation of this is to be found in the fact, alluded to in the last paragraph, that they will apply the *lex rei sitæ* to cases of intestacy even where there is a conflict between two systems, which both proceed upon the principle of a universal succession. In such cases it would be a juristic absurdity to hold that a testament had no validity in relation to particular parts of the estate.

There is no question that moveables, so far from being ruled by the *lex rei sitæ*, as regards the form of the testament which deals with them, are to be treated as if they were situated at the domicile of the testator.

Some authorities propose to apply the law of the place of execution exclusively in cases of this kind;<sup>5</sup> the majority, however, of those who pronounce particularly upon this point allow, as we have done, the testator to make his choice between the *lex domicilii* and the other.<sup>6</sup> The origin of this theory is, on the one side, the mistaken assumption that the rule "*locus regit actum*" rests upon the sovereign rights of the State in which the person has a temporary residence; and, on the other hand, the fact that, where the testament is judicial, the *publica fides* of the official or notary is not recognised unless he has observed the forms required by his law.<sup>7</sup> In the practice of England and America, the *lex domicilii* seems to be the principal rule taken for the regulation of succession in moveables.<sup>8</sup>

Further, we cannot approve of the theory which a few authors adopt, that a testament executed in a foreign country by a subject of our State according to the forms there in use is only to be recognised if the testator has not, at some later date, had an opportunity of following out the forms pre-

<sup>5</sup> P. Voet, de Stat. 9, 2, c. 3; Cocceji, as cited; Ricci, as cited.

<sup>6</sup> Ziegler, as cited; Bouhier, chap. xxviii. No. 20; Mittermaier, as cited; Hert, iv. 23-25; Rodenburg, as cited; Savigny, § 381; Guthrie, pp. 321-25; Wächter, ii. pp. 377-80; Eichhorn, § 35; Fœlix, i. § 82. Cf. *supra*, § 36.

<sup>7</sup> See Boullenois, i. pp. 422-29. He must, however, admit that any person who can by the law of his domicile execute a holograph testament is thus in a position to test abroad.

<sup>8</sup> Burge, iv. p. 588; Story, §§ 465-67. [*Infra*, p. 474.]

scribed by the law of his own country.<sup>9</sup> Such a rule may be imagined, and actually does occur in one old system of law.<sup>10</sup> But the ordinary usage of nations, which lies at the root of the rule *locus regit actum*, certainly rejects any such limitation; and such a rule is all the more unreasonable that in any particular case it must be very difficult to ascertain the fact, and that the legal position of any person would be exposed to the greatest insecurity, according as different judges might take different views of the possibility or impossibility of the deed being executed anew.<sup>11</sup> This view plainly depends upon the proposition which we have already refuted, that no legal transaction can be entered into in a foreign country, even though it be in conformity with the forms recognised there, if it is *in fraudem legis domesticæ*.<sup>12</sup>

Lastly, a modern author<sup>13</sup> has thrown out the view—primarily with reference merely to certain provisions of the Prussian Allgemeine Landrecht<sup>14</sup>—that if the legislature, by appointing some particular form for testaments, has endeavoured to defeat forgery and falsification, this form must be observed even in a foreign country, and the rule *locus regit actum* can have no application. But almost every form which is appointed by any legislature for the execution of testaments has this object in view; the necessary result of this theory, therefore, is to deny all force to the rule *locus regit actum* in so far as testaments are concerned, and

<sup>9</sup> Adlerflycht. Privatr. der Stadt Frankfurt, i. 511.

<sup>10</sup> Lübischer, Stadtr. ii. tit. 1, art. 16: "If one of our citizens die abroad, having made a testament according to foreign law, that testament will be recognised by our law. But such a testament must be executed under the presence of approaching death, and not fraudulently and of set purpose to defraud heirs."

<sup>11</sup> See Schäffner, p. 188; Savigny, § 381; Guthrie, p. 323.

<sup>12</sup> Rodenburg, ii. c. 4, § 8; and Boullenois, i. p. 427, propose that the *lex loci actus* shall not be recognised where the law of the domicile has been deliberately evaded. See, too, the judgment of the Supreme Court at Berlin, cited *infra*, note 25.

<sup>13</sup> Koch, on § 33 of the introduction to the Prussian A. L. R.

<sup>14</sup> I. 12, § 17, § 66, § 139. In § 17 it is provided: "Persons who have not yet passed their eighteenth year cannot execute testamentary deeds except as under guardianship in judicial form." By § 66: "Every testament or codicil must as a rule be laid before the court by the testator himself, or published in judicial form."

indeed, since we may well suppose that the forms required in all other legal transactions have a similar object, the result would be that this rule, so useful to commerce and in many ways quite indispensable,<sup>15</sup> would be swept away. That is certainly not the theory of the Prussian Legislature, as the treaties concluded by Prussia with other States show.<sup>16</sup>

All the treaties as to jurisdiction reported by Krug,<sup>17</sup> contain this rule:—"All legal transactions *inter vivos* and *mortis causa*, must, in so far as their validity in form is concerned, be ruled by the law of this place of execution." But to this provision we always have this addition, "so far as the act is not executed there in order to escape the prohibitive law of another State," or this, "if the validity of any act is, by the conception of the legislation of either of the States concerned, made dependent upon its being executed before some particular official body, this direction must be observed." Now such additions go to show that the rule *locus regit actum* merely confers a power, for if it were founded upon any absolute deduction of law, and if, therefore, the form of any instrument were necessarily regulated by the law of the place where it was executed, there would be no occasion to provide for an exception in the event of the law of one State absolutely forbidding it.<sup>18</sup> The French Legislature too

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<sup>15</sup> For instance, by the Prussian A. L. R., a testament cannot be made without the co-operation of the court. In France, no court is competent to undertake such a proceeding. *Quid juris*, if a native of Berlin falls sick in France, and must make his testament there? See Demangeat on Fœlix, i. p. 168; Savigny, § 382; Guthrie, p. 328.

<sup>16</sup> Savigny as cited.

<sup>17</sup> Pp. 50-1.

<sup>18</sup> Krug, p. 51, proposes that the second qualification quoted above shall not only apply to deeds which must be authenticated before some individual and definite official body—e.g., the execution of a mortgage—but also to those which must be taken before some particular class of officials. But if this exception were to be so extended, the rule *locus regit actum* would, under a strict interpretation, be excluded in reference to all deeds that require authentication before officials, for a Saxon court, for instance, is different from a Prussian court. In the same way this notion is contradicted by the fact that for a long time the rule *locus regit actum* has been applied, even although the form from which it was proposed to deviate was a judicial form, and the only exception allowed was when the law, which otherwise would have ruled the case, required the deed to be executed before the competent court—i.e., the



recognises the rule *locus regit actum* in this facultative sense, as is apparent from the provisions of the 999th Article of the Code :—

*“Un Français qui se trouvera en pays étranger pourra faire ses dispositions testamentaires, par acte sous signature privée, ainsi qu’il est prescrit en l’article 970, ou par acte authentique avec les formes usitées dans le lieu où cet acte sera passé.”*<sup>19</sup>

It will not be denied that this rule must by analogy be applied to the testaments of foreigners, which they have executed in France; just as in the older French jurisprudence, the inhabitant of a province in which, before the publication of the Code Napoléon, holograph testaments were required, was allowed the privilege of testing in this form even when abroad,<sup>20</sup> a privilege conceded on the erroneous ground that the capacity of making testamentary provisions in a holograph deed, as a personal quality, could not be lost by a residence abroad.<sup>21</sup>

On the other hand we cannot regard a provision that a testament, in order to be effectual, must be executed a certain

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*judex domicilii* or *judex rei sitæ*. Cf. *supra*, § 35. See also the view of Koch cited above. Notes 14-16, and judgment of the Supreme Court at Berlin, *infra*, note 25.

<sup>19</sup> Cf. judgment of the Cour de Paris, 30th Nov. 1831 (Sirey, 32 i. pp. 51-8). See provisions of a similar kind in articles 992, 982 of the Code of the Netherlands, and in a Grecian statute of 1830 (Schäffner, p. 194). It is only an apparent exception to the rule *locus regit actum*, if by the law of any place particular, testamentary forms are confined to the subjects of a country or the citizens of a town, a case that seldom occurs now-a-days. Cf. Schäffner, p. 190.

<sup>20</sup> Bouhier, chap. 28, No. 20; Boullenois, ii. pp. 75-97; Merlin, Rép. Testam. sect. 2, § 4, art. 1.

<sup>21</sup> See, on the other hand, *supra*, § 44, pp. 175-76. It cannot be said to be by any special kind of legal capacity that the inhabitants of one country have the power of expressing their testamentary wishes in this or in that form. Thus, for instance, the special provisions enacted by the Prussian A. L. R. for the execution of testamentary instruments by minors under eighteen years of age (A. L. R. x. 12, § 17), will not apply to testaments executed by Prussian minors in a foreign country. The disposing will of the minors is recognised. This is sufficient to exclude any question of personal incapacity which would have to be recognised abroad. The position is just the same as if the special provisions which at present apply solely to minors were extended to all the natives of the country.

time before the death of the testator, as a formal provision.<sup>22</sup> A provision of that kind means to enact that, if a testator does not survive the execution of his testament some definite period, the deed shall not be recognised as a declaration of his will. This purpose is not consistent with the notion of a formal provision.<sup>23</sup> And accordingly, so early as 1734, a French ordinance (Art 74-5), declared that the *trois mois de survie* of the testator which were required by some provincial laws constituted a *statut réel* to which the rule *locus regit actum* could not be applied.<sup>24</sup>

Of course a testament which has once been validly executed in conformity with the *lex loci actus* will not be invalidated by any change of domicile,<sup>25</sup> although one which is not in conformity with the forms required by the law of the place where it was executed, but is according to the forms of the domicile of the testator at that time, may be invalidated if the law of his latest domicile requires some different form.

The import of the testament is ruled by the law which determines generally the law of succession; and, therefore, when laws which hold the theory of a universal succession are in conflict, and in every case where moveables are in question, by the law of the last<sup>26</sup> domicile of the deceased.<sup>27</sup>

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<sup>22</sup> In the same way we do not count it a mere formal provision that the heir-at-law must, as modern Roman law requires (No. 115), be expressly instituted or disinherited, although that would be a perfectly correct notion according to older Roman law. These provisions give the heir-at-law material rights. Many (*e.g.*, Bouhier, chap. 25, No. 61), distinguish between intrinsic and extrinsic forms, and only allow the rule *locus regit actum* to apply to the latter. (See, on the other hand, *supra*, § 35, p. 136).

<sup>23</sup> See *supra*, pp. 136-37.

<sup>24</sup> Mailher de Chassat, No. 23, *ad. fin.*; Cochin, Œuvres, i. p. 545. Cf. too the points of the judgment reported in Story, § 479.

<sup>25</sup> Félix, i. p. 263; Schäffner, pp. 195-96; Supreme Court of Berlin, 3rd April, 1857 (Striethorst, 23, p. 353). "The formal validity of a holograph will made under the rule of French law is not lost if the testator shifts his abode into the territory of Prussian law, and dies there; but in order to revoke the deed, those forms and acts required by the law of the new domicile must be observed."

<sup>26</sup> Story, §§ 479-99, *ad fin.*; Wharton, §§ 596, 599.

<sup>27</sup> According to Vattel, ii. ch. 8, § 111; Boullenois, i. p. 443; iv. p. 217;

It will be kept in view that the rule *locus regit actum* is not to be applied in so far as any legal provisions, which are independent of the will of the testator, are concerned.<sup>28</sup> We need not expound at length the highly dangerous consequences of the opposite view, which would allow any one to withdraw from the reach of any such provisions by a journey into another country.

*Note T, on § 109.*

[The Code Civil provides that a Frenchman who happens to be in a foreign country may make his testamentary disposition under private signature, but this must be holograph, as prescribed by Art. 970 ; such a holograph disposition will carry heritage in France (*Marcel v. Marcel et Pellet*, C. de Paris, 3rd June, 1878) : he may also execute such a disposition according to the forms prescribed by the law of the

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and Story, § 473, the *lex rei sitæ*. According to Wächter, ii. p. 366 ; Savigny, § 377 ; Guthrie, p. 283 ; Seuffert, Comm. i. p. 259 ; Holzschuher, i. p. 80 ; Foelix, i. pp. 261-62 ; Koch, on § 23 Introduction to Prussian A. L. R. (i. 1, p. 56). Judgment of the Supreme Court of Appeal at Cassel, 28th October, 1840 (Seuffert, i. p. 98), and judgment of the Supreme Court at Berlin, 3rd April, 1857 (Striethorst 23, p. 354), the *lex domicilii*.

<sup>28</sup> Rodenburg, ii. c. 5, § 8 ; Hartogh, pp. 134-35 ; cf. Judgment of the Supreme Court of Appeal at Wiesbaden, 16th October, 1822 (v. d. Nahmer, ii. p. 155), and the judgment of the Supreme Court of Appeal at Cassel cited in the previous note (Strippelmann, ii. p. 109) ; Schäffner, p. 198. In the case suggested by several writers (*e.g.*, Wächter, ii. pp. 366-67) that the law of the place where a landed estate lies enacts that such estates shall not be capable of transmission *mortis causa*, as a rule, and in accordance with our own view, the *lex rei sitæ* must be applied. Such provisions do not as a rule exist unless there is in that country in reference to such property a modified form of particular succession in use, Rodenburg, ii. c. 5, §§ 3-4 ; Hert, iv. 23 ; D'Aguesseau, Œuvres, iv. p. 637 ; Wächter, ii. p. 386 ; Judgment of the Court of Cassation at Paris, 3rd May, 1815 (Sirey, 15, pp. 1, 532). The rule *locus regit actum* is rejected in this case. There may, however, be figured cases in which, according to an established system of universal succession, property acquired by inheritance cannot be diverted from the heirs-at-law ; in such a case the *lex domicilii* decides. In modern times, although the law is a remnant of the Germanic theory, a man's heirs-at-law have a more ample right, being not merely entitled in the division of the succession to the value of the property inherited, but to the actual *corpora* of the articles so inherited.

place for the execution of an “acte authentique” (Art. 999)—*i.e.*, by execution before some public authority of that country, or by obtaining authentication of his deed from such authority: a deed executed according to the customary forms required for deeds under private signature by the law of that country will not receive effect (*Guigonard v. Sarrazin*, Trib. Civ. de Lyons, 22nd October, 1871). But in the case of a holograph will executed in a foreign country, its effect is not prejudiced by a declaration contained *in gremio* that another deed to the same effect had been signed of even date with itself in English form (*Marcel ut supra*).

The law of England and Scotland is settled as regards moveable estate, for persons dying after 6th August, 1861, if they are British subjects, by Lord Kingsdown’s Act (24 and 25 Vict. c. 114): that statute provides, by § 1, that any will or testamentary instrument made out of the United Kingdom shall be held to be well-executed by English, Scottish, or Irish courts whatever the domicile of the person making it at the time of death may be, if it is executed according to (1) the *lex loci actus*, (2) the *lex domicilii*, or (3) the law of the domicile of origin: the common law of England held before the passing of this Act that the character and validity of any document propounded must be tried by the law of the last domicile of the testator; in Scotland, on the other hand, the *lex loci actus* had always been sufficient to render a will dealing with moveables effectual (*Purvis’ Trustees v. Purvis’ Executors*, 1861, 23 D. 812), the law of the testator’s last domicile being also admitted as regulative of his testamentary dispositions of moveables. The second section of Lord Kingsdown’s Act extends this principle to the three parts of the United Kingdom; the third section provides that no change of domicile shall render a testamentary deed once regularly executed invalid, nor alter its construction. As regards wills executed by persons who are not British subjects, the law of England will continue to require observance of the law of the last domicile, while the law of Scotland will recognise the *lex loci actus* as well.

With regard to real estate, the tendency in England and Scotland was to regulate the form of testamentary deeds by the *lex rei sitæ* solely, and in England this is still law. In

Scotland, by the terms of 31 and 32 Vict. c. 101, § 20, the law applicable to deeds of a testamentary character conveying heritage has been assimilated in so far as regards the character and validity of such deeds to that applicable to deeds dealing with moveables, and hence the provision of the *lex loci actus* if observed will sufficiently establish the validity of such a deed. In *Connel's Trustees v. Connel* (16th March, 1872, 10 M.P. 627) it was held that under the terms of this Act an English will containing a conveyance of Scots heritage, which would not have been received in Scotland prior to the Act as a probative deed, was sufficient to convey that heritage as having been validly executed as a testamentary deed in England. American law is the same as the common law of England.

As regards the construction of the provisions—the import—of a will, the doctrine of the text substantially accords with the laws of England and Scotland : as regards moveables, the law of England takes the law of the last domicile of the testator as its guide (Westlake, p. 90, § 55), in cases where the court of that domicile has had an opportunity of making a declaration as to who are entitled to the beneficial interest in the property ; where it is not so aided, the law of the testator's domicile at the date of the will will regulate the construction (§ 115, p. 127 of Westlake). In Scotland the law of the last domicile will regulate the construction of testamentary deeds as to moveables, unless the frame of the deed, and the circumstances of its execution, and the history of the testator point to another law as intended by the testator to be taken as the canon of construction (*Mitchell & Baxter v. Davies*, 3rd December, 1875, 3 R. 208).

In questions as to real estate, the law of Scotland holds that the *lex rei sitæ* will rule, and it has been decided that the terms of a foreign deed, dealing with Scots heritage, and using technical terms of foreign conveyancing, will receive effect in Scotland in such a way as will most nearly give effect to the intention of the maker of the deed, although the technical language used may be unintelligible to Scots conveyancers (*Studd*, 10th December, 1880, 8 R. 249). The law of England regards terms of years, although these are by English law personal, as immoveables for the purposes of

international law, and will, therefore, refuse to recognise directions to accumulate in contravention of the Thellusson Act given by a foreign testator, although the subject be leasehold (*Freke v. Carberry*, L. R. 16, Eq. 461 ; *Westlake*, § 154, p. 180). The English law of mortmain will not be applied to a charitable bequest which is to be satisfied out of real estate situated abroad (*Beaumont v. Oliveira*, 1868, L. R. 6, Eq. 534). But although the charitable purpose is to be executed abroad, the Mortmain Act will prevent English real estate from being taken to satisfy it (*Curtis v. Hutton*, 1806, 14, Ves. 537). “Generally all questions concerning a restraint on the alienation or disposition of immoveables are to be decided by the *lex situs*” (*Westlake*, § 155, p. 180).]

#### INTERPRETATION OF *mortis causa* DEEDS.

##### § 110.

No general rules can be laid down for the interpretation of *mortis causa* deeds—*i.e.*, for ascertaining the true meaning and intention of the testator. There is no doubt that in all questions as to the regulation of domestic affairs, the author of the deed will be presumed to have had the law and the forms of expression recognised in his own country in view much more readily than in questions as to obligatory contracts ; there is no necessity, as in transactions *inter vivos*, where one has to observe the good faith on which the other party relies, to demand that the forms of expression in use at the place of execution should be observed ; and accordingly the appropriate interpretation is as a rule that which the law of the testator's domicile requires, whether as a matter of custom or of technicality.<sup>1</sup> We can, however,

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<sup>1</sup> The following support the interpretation according to the terms and language of the domicile :—*Hert*, iv. 25 ; *Molinæus*, in L. 1, C. de S. Trin. ; *Jo. a Sande*, *Decis. Ins.* iv. tit. 8, *defn.* 7 ; *Fœlix*, i. p. 262 ; *Burge*, ii. 857, iv. 591 ; *Story*, § 479 *et seq.* A will executed in Scotland by a born Scotchman who had settled in England was interpreted according to the language of English law. *Story*, 479*f.* Illustrations :—A legacy made by the will of an Irishman is *in dubio* to be held to be in pounds of Irish currency (*Story*, 479*b.*) ; the persons indicated by the *lex domicilii* of the testator are those

imagine cases in which the testator may express himself in the language of the place where the thing in question is situated, or may be presumed to have used that of the place of execution—*e.g.*, if he has lived for some time at the place of execution, and has conceived his<sup>2</sup> testament in the language of his temporary home and not of his domicile.

## LEGACIES.

### § 111.

We need not show at any length that universal legacies are to be determined by the same rules as the institution of heirs. But in the same way it is a general rule that if the subjects are moveable, bequests of particular subjects are regulated by the *lex domicilii*,<sup>1</sup> and by that law also where the subject is heritage, if the laws which affect the question—*viz.*, the law of domicile and the *lex rei sitæ*—regard the succession as a universal succession. For although a legacy only gives the legatee a right to a particular thing or a *jus exigendi*, its validity depends on the appointment of an heir or a universal successor, and is, therefore, dependent on the law which regulates the succession generally.<sup>2</sup>

If, however, particular forms are required by the law of the place where the thing is situated for the acquisition of real rights, such, for instance, as recording in a register of

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who must be presumed to be instituted under a destination to heirs-at-law. (Burge, ii. p. 857-58 ; Story, § 479*h*.) An heir, instituted by a testator domiciled in Berlin, need not, although the estate which he is to take lies in a country subject to the common law of Rome, or the testator, during a short stay in such a country, has executed his testamentary disposition before its courts, or had it recorded there, wait for the purification of the condition attached to his institution. He transmits to his heirs all that is destined to him, if the condition is operative at all. Prussian A. L. R., i. 9, § 369-70 ; cf. L. and § 7, C. de cad. toll. 6, 51 ; L. 59, 101 ; D. de cond. 35, 1.

<sup>2</sup> See Boullenois, i. p. 503 ; Savigny, § 377 ; Guthrie, p. 283.

<sup>1</sup> See the foregoing paragraph as to the interpretation of a testamentary deed containing a legacy.

<sup>2</sup> Savigny, § 377 ; Guthrie, p. 283 ; Wächter, ii. p. 365 ; Kierulff, i. p. 80 ; Mühlenthal, iii. § 629.

encumbrances, and the right therefore cannot arise or be transmitted by the *mortis causa* deed alone, all that the legatee acquires is a right of action to compel a conveyance of the real right,<sup>3</sup> and, if the *lex rei sitæ* does not recognise at all the real right which has been bequeathed, the legacy must lapse as having directed an impossibility to be performed. To this class belongs the case of a prohibition of entails—*i.e.*, a prohibition against alienation by the institute, and an obligation to transmit it to a specified party—by the law of the place where the estate is.<sup>4</sup> The law of the place refuses in this case to allow any such limitation of the power of alienation and transmission, and will not sanction any real right which implies such a limitation. The same principle applies if this law forbids a right of usufruct to be conferred by will upon several persons in succession.<sup>5</sup>

An obligatory duty laid upon any person by a testament is invalid if the law of the place where this is to be done forbids it.<sup>6</sup> The intention of the testator must determine whether a legatee is entitled to the value of any article which has been bequeathed to him, but which the law of the country where it lies prevents him from acquiring,—a case which can seldom now occur, since the principle of the equality of foreigners and natives, and of the adherents of

<sup>3</sup> Wächter, ii. p. 367.

<sup>4</sup> Cf. *e.g.*, Code Civil, art. 896-99. These provisions, however, by reason of the recognition in France of a universal succession, affect not only all the real estate situated there, but the succession of Frenchmen generally, unless the *lex rei sitæ* recognises a particular succession. Savigny, as last cited; Judgment of the Rhenish Court of Cassation at Berlin, 9th July, 1823 (Volkmar, p. 235); Bouhier, chap. 27, No. 91-3. The law of the place where the estate lies, however, will regulate the competency of executing a family deed of entail which is not testamentary,—*i.e.*, which cannot be recalled by the voice of the maker himself,—and if it is necessary, besides, to obtain the approval of Government, the Government in question will not be that of the entailor's domicile, but that of the country where the estate lies. For the execution of a deed of entail in such a case divides the estate so entailed from the rest of the property before death, while in the former case—*i.e.*, of a deed *mortis causa*, the trust for entail, like any other bequest, depends upon the same destiny as regulates the whole inheritance.

<sup>5</sup> Wächter, ii. p. 368.

<sup>6</sup> Cf. *supra* the law of obligations, and Story, § 472a.



different religions in the eye of the law has been so generally introduced.<sup>7</sup>

RIGHTS OF *heredes legitimi* AND OF PERSONS ENTITLED BY  
LAW TO SHARE IN THE SUCCESSION—REVOCATION OF  
WILLS.

§ 112.

The same law that regulates intestacy will of course also regulate the rights of those who have a claim *ex lege* to share in the succession. According as we propose to apply the law of the domicile or of the *rei sitæ* to intestate succession, we must also apply either the one or the other to questions of this kind.<sup>1</sup> As to the competency of challenging a gift *inter vivos* by which the rights of these legal claimants (*Heritiers à réserve*) are injured, see *supra*, § 82, and see *supra* § 97 as to the limitations placed upon testamentary deeds by spouses).

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<sup>7</sup> Cf. the provisions of the Roman law as to the case where the legatee has not the right of *commercium* in the subject of the legacy, L. 49, §§ 2, 3, D. de legat. ii., L. 40, D. de leg. i.; Puchta, Pandekten, § 529*h*.

<sup>1</sup> For instance, for the *lex rei sitæ*:—Argentæus, as cited; J. Voet, in Dig. 5, 2, § 47; Christianæus, in leg. Municip. Mechlin, xvi. art. 26, No. 4; Burge, iv. p. 303: for the *lex domicilii*, Bouhier, chap. 25, Nos. 50-6; Seuffert, Comm. p. 259; Walter, § 49; Wächter, ii. p. 365; Savigny, as last cited. An undetermined case in the older French jurisprudence was whether, in the case that one *coutume* allowed a party to test upon a definite share of his *biens propres*, or *acquêts*, if he was possessed of *biens propres*, it was necessary to reckon up all the property belonging to one testator in whatever territory it might be situated, if a question arose as to whether he had exceeded the *quantité disponible* in his testamentary arrangements. Cf. Merlin, Rép Réserve Coutumière, § 3, No. iii. But although by older French law, following the principles of Germanic law, the family estate was not held to be capable of being the subject of a disposition *mortis causa* or of a gift, and testamentary provisions were only allowed exceptionally in reference to some part of such estates, and the conception of a *quantité disponible* was retained by the Code Napoléon (cf. Zacharia, Franz. C. R. iv. § 586, notes i. and ii.), it can only be the *lex domicilii* and not the *lex rei sitæ*, as in the case of the old *coutumes*, that is to be applied in cases of conflict between the *Code Civil* and a system which holds the theory of succession as a universal succession; because the provisions as to the *quantité disponible*, contained in the *Code Civil*, are no longer limited to family estates, but apply to all pro-

The revocation of dispositions *mortis causa* by some expression of the testator's will, is subject to the same law as their execution, and the observance of the law of the place where the deed is drawn out will, in this class of cases also, be sufficient, in so far as the intention of the testator to revoke it is plain,<sup>2</sup> except in the case where, as by the law of England, the forms of the *lex rei sitæ* are required to be

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perty heritable and moveable. French authors, however, seem to regard the rights of the *héritiers à réserve* as a *statut réel* upon the same grounds as were assumed by the older authors. Demangeat on Fœlix, i. p. 63 ; Fœlix, i. p. 129.

[The laws of England and Scotland adopt the doctrine of the text ; for the former, see Westlake, p. 125, for the latter, the leading case of *Hog v. Lashley*, 3 Hogg, Eccl. 415, and 3 Paton's App. 247. The law of Scotland will not pay any heed to an English marriage contract, the terms of which are said to exclude a demand made for legitim out of the estate of a father who died a domiciled Scotsman, although at the date of the marriage contract, in which the claim is said to be discharged, he was a domiciled Englishman—*Trevelyan v. Trevelyan*, 11th March, 1873, 11 M'P. 516. "The question seems to be this, whether or not the succession of a domiciled Scotsman is to be regulated by the law of Scotland,"—*per* Lord Neaves. There are several cases in the French courts which determine that, although the succession in the moveable estate of a foreigner possessed, it may be, of a residence in France, but not domiciled there, will be regulated by the law of a foreign domicile, still it is competent for the French courts to attach any moveable estate belonging to that succession that may be situated in France, in order to satisfy out of the proceeds thereof any claims by French co-heirs, which would not meet with recognition from the law of the foreign domicile, but which the law of France, in the interest of public order, desires to see satisfied—claims which it deems essentially and fundamentally justifiable ; *e.g.*, a claim to participate as representing a bastard child, which the law of the foreign domicile, in this case England, will not recognise. Nor is this rule of law merely dependent on decisions ; by a statute of 14th July, 1818, it is declared to be a privilege of French subjects (*Becker v. Chantrenille*, C. de Bourdeaux, 18th Jan. 1881 ; *Mayo v. M'Henry*, Trib. Civ. de la Seine, 1st March, 1881 ; *Cour de Paris*, 14th July, 1871). The law of France will not recognise any disposition of property executed abroad by a domiciled Frenchman as valid if it is forbidden by the law of France (*Hopkins v. Knight*, Trib. Civ. de la Seine, 8th April, 1875).]

<sup>2</sup> Gand, No. 597, is of a different opinion. He approves of a judicial decision by which it was held that a holograph testament executed in France by an Englishman could not be revoked by a second testament executed in England, and complying only with the formal requisites of an English and not of a French deed of the kind, in so far as the first comprehended estate situated in France.

observed. Contracts as to succession are regulated by the same law as testaments; but it is not possible to revoke a contract once validly made by any subsequent change of domicile, unless in so far as the rights of *heredes legitimi*, which must be ruled by the law of the last domicile, are concerned. This is of special importance in determining the capacity of a deceased person to have executed a contract as to succession. In the case of mutual contracts the predeceaser is regarded as the testator.

The *lex domicilii*, therefore, rules questions that arise from the conflict of systems which recognise the doctrine of a universal succession. This is the result not merely of the similarity of contracts as to succession and testaments, both of them consisting in the operation of the will of the testator upon the law of intestate succession, but would also be inferred from the principles of bilateral contracts. There can be no question as to excluding the application of the law of the place of execution (unless the question is one as to form alone, and therefore the rule *locus regit actum* must be recognised<sup>3</sup>), in the case of a contract as to succession, the object of which is to regulate family concerns.<sup>4</sup> But, no doubt, less attention will be paid to the terms and language of the domicile in interpreting bilateral contracts, if the parties have different domiciles, than would be the case if a testament were concerned.

### C. TAKING UP THE SUCCESSION.

#### § 113.

The law which regulates questions of succession generally will rule the question as to the taking up of the inheritance.<sup>1</sup> (The mode of entering on the succession may, however, except in the case of a particular succession in real estate,

<sup>3</sup> See *supra*, p. 128-29, as to the effect of a change of domicile upon this question.

<sup>4</sup> Savigny, § 377; Guthrie, p. 285; Seuffert, Comm. i. p. 259; Thöl, 79; Holzschuher, i. p. 80.

<sup>1</sup> The *lex domicilii*, therefore, of the deceased, and in certain cases the *lex rei sitæ*—Boullenois, i. 237-38; Burge iv. p. 641.

which is subject to the *lex rei sitæ*, be regulated by the forms of the country where the act is done.)

In particular, this will determine the liability of the heir for his ancestor's debts—*e.g.*, whether the heir is liable for the whole or only for a part, personally liable or only to the amount of what he takes<sup>2</sup> (cf., however, *supra*, § 107, note 41 *et seq.*), the obligation to collate,<sup>3</sup> and the duties exigible on the succession.<sup>4</sup>

Some jurists<sup>5</sup> propose that the law of the place where the greater part of the inheritance lies should always rule. This proposal rests upon an erroneous application of the provisions of the Roman law as to jurisdiction in *Fideicommissa*, provisions which have nothing to do with local law.<sup>6</sup>

Others propose that the law of the last domicile shall be applied to all questions under this head, although for all other questions of succession they regard the *lex rei sitæ* as regulative. The reason on which they justify this view<sup>7</sup>—*viz.*, that the obligations of the heir arise from a *quasi* contract, which must be held to have been entered upon wherever the last domicile (*domus mortuaria*) may have been—is

<sup>2</sup> Judgment of the Supreme Court of Berlin, 17th Dec. 1855 (Striethorst, 19, p. 186): "The legal position of a foreigner domiciled abroad with regard to an inheritance which has fallen to him in Prussia, and specially with relation to questions of vesting and entering upon the inheritance with or without reservation, is to be determined by the law of Prussia." (The defender was sued as being heiress to an estate, and by the A. L. R. 9, §§ 307 and 379, there is no need of a declaration of having entered upon it.) For the *lex rei sitæ* we have Burgundus ad Consuet. Flandr. ii. 16; Merlin, Rép. Dette. § 4, No. 1; Burge, iv. p. 724. For the *lex domicilii*, Bouhier, chap. 24, No. 186; Günther, p. 735; J. Voet, in Dig. 29, 2, § 31; Boullenois, i. pp. 277, 280, 538.

<sup>3</sup> So Schäffner, p. 179-80; Boullenois, i. pp. 275-76; Burge, iv. p. 730. It is, of course, obvious that if one who is under an obligation to collate does not enter upon the succession, any donation made to him can only be challenged by the other heirs under the conditions set out, *supra*, p. 336. See Boullenois, as cited, and the case cited by Story, § 486.

<sup>4</sup> Judgment of the Supreme Court of Appeal at Lübeck, 28th Feb. 1857 (Frankfurt Coll. 3, p. 112).

<sup>5</sup> *E.g.*, Paulus de Castr. in L. fin fidei comm. 50, D. de jud. 5, 1. Cf. L. con. C. 3, 17.

<sup>6</sup> See against this, Savigny, § 376; Guthrie, p. 281.

<sup>7</sup> See, for instance, J. Voet, as cited.

condemned and refuted by their own general theory,<sup>8</sup> by which succession is held to be a mere transmission of the various assets of property to the heir. Their mistake is accounted for in this way, that they apply the *lex rei sitæ* to cases of conflict between territorial laws that hold the theory of a universal succession ; accordingly, the grossest inconsistencies in questions as to the taking up of the succession and the liability of the heir are found to arise in attempting to apply this general theory.

It follows from the principles of the law of obligations that an obligation arising from a quasi-contract, such as an enactment regulating the relation of one party to other parties and to things is necessarily limited to the territory where the inheritance is, and therefore, where there is a universal succession, to the territory where the deceased had his domicile ; and that, therefore, a person domiciled abroad cannot without his own consent be personally put under obligations by the vesting of a succession in him, unless the case is the same by the law of his own domicile, or unless he was at the domicile of the testator when the inheritance fell to him. *E.g.*, by the Prussian A. L. R. (i. 9, § 368) the succession vests in the heirs *ipso jure*. If the heir is domiciled in a country where Roman law rules—*e.g.*, in the town of Hanover—he will not come under personal liability, although he allows the period which the Prussian law assigns (A. L. R. i. 9, §§ 384 and 421) for deliberation and making up of inventories to pass by without taking any steps, unless during this period he resides in Prussian territory. It is at variance with the principles of international law that inhabitants of one country should be put under obligations by the law of another country without their consent, and without having left their own territory (cf. judgment of the Supreme Court at Berlin, 1st Nov. 1850, Decis. 20, p. 204). All that the courts of Prussia or the next heirs and the creditors could do would be to require the heir domiciled in Hanover to make his

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<sup>8</sup> See against this, Merlin, as cited :—“ *Le quasi contrat qui résulte de l'apprehension, que fait un héritier des biens du défunt, se passe certainement dans le lieu, où les biens sont situés : car il y a autant de successions que de coutumes.*”

election within a definite time, and if that elapsed without his taking any step, then the consequences provided for such a case by the Roman law<sup>9</sup> would follow, unless the Prussian law is more favourable to the heir in the event of his taking up the inheritance.<sup>10</sup>

The common law of England exhibits a peculiarity in its rules for taking up a moveable succession. The heir must obtain authority from a competent court to enter upon possession of the moveable estate—letters of administration—and then pay the creditors of the deceased and his legatees *in mobilibus*, under the superintendence of this court.<sup>11</sup> This rule is applied to any moveable estate of a foreigner which may happen to be in England. The title of the heir to obtain letters of administration is, however, regulated by his *lex domicilii*, and this procedure takes place not only when the whole aggregate of a succession is in question, but even when a claim is made before the court to some one asset falling to the heir. Its object is to give security to the creditors and legatees, and its application to the moveable estate of foreigners situated in the country must be held, according to the principles of international law, to be as sound as to determine the rights of preference among the creditors according to their own law.<sup>12</sup>

It seems doubtful, and it is, in view of the multiplicity of commercial relations, a question of interest, whether one who has paid to an heir abroad *in bona fide*, before he has obtained letters of administration, is discharged of his debt.<sup>13</sup> Now, since the law of England forbids the heir at his own hand to take the inheritance only so far as it is in England, in the first place, a debt paid by an English debtor in another country must be held as discharged,<sup>14</sup> for in such a case the heir has not as a fact been brought into contact with the

<sup>9</sup> Cf. Puchta, Pandects, § 498.

<sup>10</sup> The heir can come under no further obligations than the law under which the succession falls will allow.

<sup>11</sup> Cf. Story, § 501 *et seq.* [See *supra*, p. 449, note 10.]

<sup>12</sup> Story, § 524 *et seq.* It is a kind of bankruptcy procedure. See *infra*, § 128.

<sup>13</sup> That is when the estate is insolvent.

<sup>14</sup> Story, § 514b.

debt in England ; and this result is all the more equitable that the debtor could hardly plead in any foreign court that the heir had not yet taken out letters of administration in England. The same would hold good if the debtor sent the sum to the heir who is abroad ; and as in practice letters of administration have no effect upon property which is *in transitu*, and therefore is not permanently in the country—*e.g.*, a ship—and therefore it is of no importance to determine the immediate *situs* of the property at the moment of the death of the ancestor,<sup>15</sup> the necessity of taking out letters of administration seems logically to be limited to the case where the ancestor possessed for some time an aggregate of property with debts due to and by it, as would be the case if he had had, for instance, a trading house in England. The payment of a debt in any other case would necessarily discharge the debtor. But as regards that event, the practice of England and America is not yet fixed.<sup>16</sup> Although, therefore, there may be circumstances in which it is necessary for the heir of a foreigner to take out letters of administration, that will furnish no argument for the theory of English and American practice already set forth—*viz.*, that the guardian of a foreigner must be confirmed in England in order to be able to administer the estate there.<sup>17</sup> The administration of the ward's estate is conducted in the interest of the ward alone, who is a foreigner and does not belong to the State ; while the supervision of the court in letters of administration takes place in the interest of the English creditors and legatees.

#### D. RIGHTS TO ESTATE WHERE THERE IS NO HEIR.

#### § 114.

The question to which State property is to fall where there is no heir, whether to that in which it is situated, or to that to which the last possessor belonged, is dependent upon whether the right of the State to succeed is to be considered

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<sup>15</sup> Story, §§ 519-20.

<sup>16</sup> Story, § 515 *et seq.*

<sup>17</sup> Story argues to this effect, § 504.

to be a right *occupationis* or a right of consolidation belonging to the feudal superior,<sup>1</sup> or as a true right of succession. In either the first or second case, the property will go to the State where the property is situated; in the last case it will fall to that of the domicile of the deceased, in so far as both States hold the theory of a universal succession, or as the estate is made up of moveables.<sup>2</sup> The same rules, too, must be applied in relation to the liability of the State to creditors and legatees. But the State can never rid itself of the obligation to pay the debts that are attached to the moveable estate. (See Savigny, as above.)

VII. APPENDIX—LIMITS OF THE TERRITORY OF THE STATE  
—STATUS OF FOREIGN GOVERNMENTS IN QUESTIONS  
OF PRIVATE LAW—SHIPS—LEGAL TRANSACTIONS IN  
UNCIVILISED COUNTRIES—QUESTIONS AS TO RIGHTS OF  
PRIVATE PROPERTY AND OBLIGATIONS IN TIME OF WAR.

§ 115.

Public international law determines the boundaries of the territory of each State,<sup>1</sup> and we need only note that the sea to the distance of a cannon-shot from land is reckoned as belonging to the land, although there does not seem to be any very general agreement as to the precise meaning and effect of the rights of sovereignty claimed over what really belongs to the sea, and serves for the common intercourse of nations.<sup>2</sup>

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<sup>1</sup> So, too, in real estate by the law of England (Blackstone, ii. p. 243; Stephen, vol. i. p. 433.

<sup>2</sup> Savigny, § 377; Guthrie, p. 285, from the point of view of the Roman law (cf. Puchta, § 564) decides in favour of the fisk of the domicile. The judgments of the French courts cited by Demangeat give all property found in France without an heir, moveable and immoveable, to the French State, as things *sine domino*. By the provisions of the Code Civil, art. 813, the right of the French fisk seems to be regarded as a true universal succession.

<sup>1</sup> See Heffter, § 66.

<sup>2</sup> Cf. Vattel, i. §§ 289, 278; Hélie, p. 507; Ortolan, § 928; Heffter, § 73 *ad fin.*  
[In the case of the *Franconia*, *Queen v. Keyn*, 2 Exch. Div. 63, Nov. 13, 1876, there are instructive opinions on this point by Sir R. Phillimore, who



The privilege of extra-territoriality, which belongs to foreign sovereigns and their envoys,<sup>3</sup> consists in the exclusion of the jurisdiction of the State from these persons, and to a certain extent from things which are in their possession. But that privilege has no influence upon the private legal relations of these persons ; and, again, just as, according to the principles we have adopted, in the case of other persons questions of capacity, of family relations, and of succession,<sup>4</sup> are determined by the *lex domicilii*, while obligatory contracts, too, are subject to that law, in so far as *bona fides* does not require the parties to be subjected to the law of the place where the transaction was carried through, or as the parties do not tacitly or expressly have recourse to some other system ; whereas in the law of things it is impossible to carry out the application of the law of the domicile of one of the parties concerned ;<sup>5</sup> in the same way we must exclude it from affecting any of the legal relations of the persons who may claim the privileges of extra-territoriality. The rule *locus regit actum* rests, as has been shown,<sup>6</sup> not upon any subjection of the parties concerned to the sovereign rights of the State in which the deed was executed, but upon a customary recognition of this rule by the law of the State to which the transaction naturally belongs. There is therefore no reason for excluding the application of this rule in the case of those entitled to

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delivered the leading judgment, and Kelly, C. B. The question for the decision of the Court in that case was as to the existence of a criminal jurisdiction within the cannon-shot limit, but there are observations as to the limits of the jurisdiction or administrative rights within these limits, and as to the difficulty of exercising these, that touch the point raised in the text. By a statute passed in 1879 (41 & 42 Viet. c. 73), the jurisdiction which the court had declined to assert in this case was conferred upon them.]

<sup>3</sup> Consuls do not as a rule enjoy this privilege. Cf. Fœlix, i. p. 422 ; and on the special position of the consuls of European powers in the East, Heffter, § 245 *ad fin.* [Held by the Cour de Paris in the case of *Bernet v. Herran et Pelletier*, 30th June, 1876, that although plenipotentiaries cannot be cited before the courts of France, foreign consuls can, except in matters in which they have acted in their official capacity.]

<sup>4</sup> Cf. *supra*, § 107, as to the application of the *lex rei sitæ* in the law of succession.

<sup>5</sup> See *supra*, § 57.

<sup>6</sup> Cf. *supra*, § 34, note 4, and § 35.

claim extra-territoriality,<sup>7</sup> since, if the opposite view be carried to its logical conclusion, it would render it very difficult and frequently impossible for the privileged persons to contract with the inhabitants of the country in which they may happen to reside.<sup>8</sup>

<sup>7</sup> The fiction that such persons are in their own country, which some adopt, goes too far. If that were so, other persons in the ambassador's hotel would be subject to the law of his country. See against that Heffter, § 42, 1. The reasons on which the doctrine rests demand no more than that the persons attached to the embassy, their attendants and the things which they use, should be exempt from any foreign jurisdiction or criminal law. The ambassador's hotel is not recognised as a foreign territory. Any delict committed there by a person not entitled to the privileges must be decided by the law of the land where the hotel is situated. Nor can we urge as an analogy the case of foreign ships of war. The ship of war is only temporarily in the waters of the foreign State, and is always separate from the proper territory of that country like a moveable fortress, while on the other hand the ambassador's hotel is in immediate connection with the soil of the foreign land (cf. Ortolan, § 521, 945 ; Heffter, § 63 *ad fin.*). There is no question that a creditor can make good a right of pledge or hypothec against the real estate of the ambassador, in so far as he himself does not live in or on it, or use it, if it be a house, as a place of business (cf. Bynkershoek, *de foro legatorum*, ix. §§ 9-10 ; Fœlix, i. p. 425 ; Vattel, iv. § 115), and the same is the case with all real estate which the ambassador does not use for his own purposes or for the service of the State. But a creditor can claim a right of pledge even over articles in the personal use of the ambassador, in so far as he happens to be in actual possession of these articles. In this case he needs no interposition of the authority of the State against the ambassador, in order to make his right good. It will rather be necessary for the ambassador in the case we have put, to bring an action against the creditor who is in possession. On the other hand, a tacit submission of the ambassador to the courts of the State cannot be quoted as if it were an interposition of the Courts. The ambassador cannot subject himself to the jurisdiction of a foreign State without the express permission of his sovereign, and every privilege of an ambassador might be put aside if the other argument were admissible. (See the argument in the dispute between the Government of H.M. the King of Prussia and the embassy of the United States given in Wheaton, § 288, p. 287). In doubt, however, it must be held that moveables in possession of the ambassador serve his personal want. (Cf. Vattel, as cited, and Fœlix, i. pp. 427-28).

<sup>8</sup> Vattel, ii. § 213 ; Wheaton, § 227, p. 287 ; Heffter, as cited. A contract concluded by a foreign sovereign or his representative with a private person is not to be construed by the law of the place where it was executed, in so far as the obligation of the sovereign is concerned, unless it belongs to the ordinary contracts of commerce, and does not appear to be an act of the foreign Government as such. In this way purchases or contracts for delivery of goods made by one Government in the country of another may no doubt

The jurisdiction that ambassadors and consuls claim over the subjects of the countries they represent is no part of our subject; it belongs to public international law. But any contract concluded before an ambassador or consul between two subjects of the country he represents, must be recognised everywhere as valid in form, since the rule *locus regit actum* has merely a permissive force,<sup>9</sup> and the documents in reference to such a contract must be recognised as authentic, provided always that the ambassador or consul has the necessary powers by the law of his State.

Ships on the high seas and ships of war even in foreign ports are recognised as parts of the territory of the State whose flag they carry in the ordinary and recognised manner.<sup>10</sup> Every act done on board a ship on the high seas is held as if it had been done in the territory of the State to which the ship belongs; but as the stay of passengers on board of the ship is but of short duration, a reference to the domestic law of the contracting parties will be much more easily presumed than in the case of residence in a foreign country, and the force of *bona fides* to compel the application of the *lex loci contractus* will be much less readily recognised than on shore.

The following case suggests difficulties. According to the maritime law of several States in the case of an accidental

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under certain circumstances be decided by the law of the place where the contract was executed, but not in the case of State loans, for example, which are negotiated in accordance with a financial statute or a decree which has been formally published and passed by the sovereign, although no doubt the terms in use at the place of the contract may be of importance in interpreting the contract. A foreign creditor is therefore obliged to be content with a repudiation of the loan of any State by its own enactment, without being able to compensate himself for his losses, if he happens to be the creditor of the same State, unless the statute has been passed, contrary to the principles of international law, to affect foreign creditors only. As a rule there is no remedy except by diplomatic negotiations. Cf. Vattel, ii. § 21. [*Infra*, p. 495.]

<sup>9</sup> Cf. *supra*, § 36. From this it follows that in unilateral contracts, an ambassador can avail himself of the forms prescribed by the law of his own country, which many hold a special privilege of ambassadors (cf. Foelix, i. p. 416). The constitution or transmission of real rights is, of course, excluded.

<sup>10</sup> Cf. Heffter, § 77. Merchant ships in rivers and ports are otherwise dealt with, cf. Heffter, § 66.

collision of ships, or where the cause of the collision cannot be ascertained, the owners of the two ships must share the loss,<sup>11</sup> while by other laws—*e.g.*, that of England—each owner bears his own loss.<sup>12</sup> The rules laid down *supra* (§§ 87-88), as to delicts and quasi-delicts, do not apply, since there is no definite territory subject to one sovereign in which the fact has taken place. Since no system of law can lay any obligations save upon persons who are in its own territory, in my opinion no further claim can be made against either party than the law of his own country will allow, and because such a law as that which apportions the loss rests merely upon grounds of equity, and as it would be inconsistent with equity that any law should place its own ship at a disadvantage, no more can be demanded than that which the law of the pursuer's domicile would allow a ship-owner in similar circumstances. If the law of the court in which the action depends were to be exclusively applied, that would imply a claim of sovereignty over ships of other nations upon the high seas.<sup>13</sup>

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<sup>11</sup> Cf. Prussian A. L. R. ii. 8, § 1911, and the passages from the Maritime Law of Hamburg quoted in Kraut, Grundriss, § 380, No. 6; and 407th article of the French Code.

<sup>12</sup> Cf. the Allgem. Deutsches Handelsgesetzbuch, art. 736.

<sup>13</sup> Cf. Story, § 423, S. L., who hesitates, however, between our rule of reciprocity and the *lex fori*. Although the judgment reported in § 423*h*, note 3, by Story, seems in its reasoning to support the latter, it proves nothing in its favour, because in that case the forum and the domicile of the defender coincided, and by the law of the forum the defender was not bound to make good the damage. On the other hand, the judgment of the Court of Rouen which Story cites, § 423*g*, note 3, seems to favour the view taken in the text. A French ship was run down by an English ship on the high seas. The Court threw out the action. Story does not, however, give the grounds of the decision, and I have not been able to get sight of them. A judgment of the Supreme Court of Appeal at Lübeck, 30th January, 1849, (Bremer Coll. vol. ii. part ii. pp. 8-10), proceeds on different grounds. It holds the 10th article, § 1, of the Hanseatic Maritime Law, whereby in the case of an accidental collision the ships bear the loss equally, applicable to the case of a collision between two foreign ships. A judgment of the Supreme Court of Berlin, 25th October, 1859, reported in Seuffert, 14, p. 335, agreeing with the theory of the text, makes the law of the domicile of the ship against which the claim is made the primary ground of action. But although the court held it quite competent to take into account at the same time the law of procedure recognised at the seat of the court, it is to be noted that in that

Contracts concluded in uncivilised countries may, by agreement of parties, be concluded under forms of local law, which our legal theories will recognise, or may be so concluded tacitly and without express agreement; or else the parties may subject themselves to the law of some other civilised State within such limits as the prohibitory laws of the State of their domicile will permit; otherwise, these contracts must be determined by the laws of both of the contracting parties, just as if the contract had been concluded by correspondence without a meeting, or as if the place of the contract could not be ascertained.

War cannot directly disturb or affect the private legal rights of the subjects of the opposing States, since from a legal point of view it is merely a means of forcing another State to recognise or to fulfil a duty, or of repelling an unjust attack; but yet exceptions are often made as regards the property of subjects of the hostile State, and unjustifiable confiscations are often made under cover of the expressions "embargo" and "reprisals." The right of any Government to visit with confiscation the property of its enemies, which it is probable may be used to its prejudice, if it considers such a course to be for its advantage, and to deny to the subjects of a hostile State the right to plead in its courts, cannot be disputed. But the latter step is not a necessary result of war, and a judge is not entitled to reject the suits of alien enemies on that account without instructions from higher authority to do so.<sup>14</sup>

The Roman law makes special provisions for things in the power of the enemy. An undertaking to deliver a *fundus hostium* is reckoned among undertakings that are actually impossible, and a contract to that effect is held null.<sup>15</sup> The reason was that it was quite impossible according to the views of international relations that then prevailed that there should be any legal transactions in reference to things belonging to an enemy. It was otherwise with things

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particular case the process depended in the country which was the domicile of the injured ship.

<sup>14</sup> Cf. Heffter, §§ 123, 140.

<sup>15</sup> L. 103; D. de verb. oblig. 4, 1; Cf. *supra*, § 2, note 1a.

moveable in the power of the enemy. These might under certain circumstances be withdrawn from the power of the enemy by means of an acquisition on the part of a private person.<sup>16</sup>

These rules have, however, lost their application in modern times, since the principles of our public law make it quite possible that there may be legal intercourse with subjects of a hostile Government. Obligations with reference to things belonging to such persons are, as a general rule, to be treated like obligations as to any other things. War may under certain circumstances have to be considered as the cause of an interruption of communication, and the delivery of a thing belonging to the enemy may fall under the category of illegal contracts, if all intercourse of that kind with hostile subjects is forbidden.<sup>17</sup> Such a prohibition must, however, be expressly made by Government, since a declaration of war cannot of itself be held to be an absolute bar to trade and commercial contracts, although the law of any State may declare it to be so.<sup>18</sup>

With regard to modern rights of *postliminium*, and particularly the disputed question as to the recapture of ships, we must refer to the treatises on public law, since it would overstep the limits of this work to enter upon any thorough discussion of those questions.<sup>19</sup>

#### Note U, on § 115.

[That the fiction of the ambassador's hotel being part of the territory of his country is not carried to its legitimate conclusions, is proved by the judgments of the courts of Austria and of France, to the effect that marriages celebrated between natives of the country to which the ambassador is accredited, or between one native of that country and a woman of the

<sup>16</sup> L. 104, § 2, D. de legatis, i. : "*Etiam rem hostium posse legari, Sabinus ait, si aliquo casu emi possit.*" Cf. on the whole matter, Mommsen ; *Beitrage zum obligationenrecht*, i. pp. 15-16.

<sup>17</sup> Mommsen, as cited above.

<sup>18</sup> Heffter, § 123.

<sup>19</sup> Cf. Heffter, §§ 187-89.

same nationality as the ambassador, in the chapel of the embassy, according to the forms of the ambassador's country, are not recognised as valid, although if they had really been celebrated in his territory they would have been recognised. An Austrian married an Englishwoman in English form in the chapel of the English embassy in Vienna; that marriage was held null by the Supreme Court of Austria, 17th August, 1880: and similarly a marriage between two French people in the hotel of a foreign ambassador was held null by the Tribunal de la Seine, 2nd July, 1872. (The judgment is given at length by Fraser, Husband and Wife, p. 1539).

No doubt English courts have held that marriages celebrated in the residence of an ambassador of England, where only one of the parties is English, are valid, and that has been by the legislature declared to be the law in cases where a marriage is celebrated between a foreigner and a British subject before a British consul duly authorised to perform such marriages (4 Geo. IV. c. 91, expounded by Dr. Lushington, in *Lloyd v. Petitjean*, 1839, 2 Curteis, 251; and 12 and 13 Vict. c. 68); but a statute of the British Parliament can never make these marriages valid in the country where they are celebrated, and the necessity of passing statutes to legalise them in England is an additional indication that the fiction of the ambassador's house being the territory of his country is not accepted as sound. The result of these statutes is that a marriage, which is good in England, will not be recognised anywhere else. (See Dr. Lushington's opinion, *ut supra*).

That the *forum rei sitæ* is not excluded by the fact of the ownership being in a foreign sovereign or ambassador is recognised in the law of England;<sup>1</sup> the considerations on which English courts have based the doctrine of extra-territoriality—viz., the independence of a foreign sovereign, and the courtesy which induces courts to refrain from anything that would prejudice the dignity or interfere with the functions of a foreign sovereign or his representative, do not apply where the existence of real property gives a means of execution that

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<sup>1</sup> The Khedive of Egypt has been held to be no independent sovereign (*Charkieh*, 7th May, 1873, A. and E. iv. p. 59, Sir R. Phillimore).

does not involve any personal diligence. By parity of reasoning it has been held in the courts of England and America that a proceeding *in rem*, such as the attachment of a ship belonging to a foreign sovereign and engaged in trade (for ships of war being for his public service cannot be seized), will give jurisdiction over a foreign State or foreign sovereign. Trading by a foreign sovereign will cause the exemption accorded to him in his public capacity to cease. In the case of the *United States v. Wilder*, 3 Sumn. U.S. 308, the question was whether property belonging to the Government was liable to make contribution in a case of general average, and this claim was attempted to be enforced by lien : Mr. Justice Story was of opinion that the fact that a lien was the only method of enforcing the liability was the best reason possible for sustaining it. He said : "A distinction has often been taken between writers on public law, as to the exemption of certain things from all private claims,—as, for example, things devoted to sacred, religious, and public purposes—things *extra commercium* and *quorum non est commercium*. That distinction might well apply to property like public ships of war held by the sovereign *jure coronæ*, and not be applicable to the common property of the sovereign of a commercial character, or engaged in the common business of commerce." The public property of the sovereign is distinguished from other property not belonging to the State Establishment, in the case of the Schooner *Exchange v. M'Faddon*, 7 Cranch. U.S. Supreme Court, Rep. p. 116.

In the case of the *Charkieh*, where it was sought to enforce a damage lien by proceedings *in reus*—viz., against a ship belonging to the Khedive of Egypt—Sir R. Phillimore held that the Khedive was not entitled to the privileges of a sovereign ; but although this ground was sufficient to dispose of the case, he delivered an elaborate judgment to the effect that where by proceeding *in rem* against the property of a foreign sovereign the indignity of personal execution or service of the summons can be avoided, no ground for a plea of extra-territoriality exists. "The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between Governments, though they may be



dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign State ; if the suit takes a shape which avoids this inconvenience, the object both of international and ordinary law is attained,—of the former, by respecting the personal dignity and convenience of the sovereign, of the latter, by the administration of justice to the subject.” It was not, however, necessary to decide this point, and the reasoning has been questioned in a later case (*Parlement Belge.*, 1879, L. R. 4, P. D. 129). See Westlake, too, p. 212, § 180.

A foreign Government is presumed to contract under its own laws, but may voluntarily subject itself to the law of another country (*Gouvernement Ottoman v. Comptoir d'Escompte*, Trib. Civ. de la Seine, 3rd March, 1875). If the bankers who issue a foreign loan come under personal guarantees to subscribers, they may be called upon to make these good in the courts of the country to which they belong, although the foreign Government cannot be cited (*Dreyfus v. Dreyfus Gellinard, &c.*, C. de Paris, 25th June, 1877).

Similarly, the English courts have held that when the Government of a foreign State contracts a loan in another country, that contract is governed by the law of the State whose Government contracts the debt, and not, as would be the case with private persons, by the law of the country in which the contract is made. So, where the Peruvian Government had contracted a loan on the security of a quantity of guano, which was hypothecated in the hands of an agent in England for payment of the loan and interest, the Court of Chancery refused to compel payment out of the proceeds of the sale of this guano, holding that it had no power to enforce a personal obligation undertaken by a foreign Government. (*Weguelin*, 1869, L. R. 8, Eq. 198).

The question of the jurisdiction of foreign courts in such matters, and the conditions under which action has been allowed or refused against foreign States or sovereigns as against private persons, is further discussed *infra*, note to § 130.]

## Fourth Part.

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### CIVIL PROCEDURE.

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#### I. GENERAL PRINCIPLES—SCOPE OF THE SUBJECT—VOLUNTARY JURISDICTION—*Publica Fides* OF OFFICIALS.

#### § 116.

THE subject of civil procedure deals with the determination and realisation of private rights by means of the agencies established by Government ; these rights are determined by the sentence of the judge, and are realised by decrees of the magistracy or application of the rules of diligence, if the parties fail of their own accord to follow out the terms of that sentence.

It is indisputable that rules of diligence can only be brought into play in accordance with the law of the place where it is proposed to use them ; any application of a rule of diligence, whether by an official or by a creditor or successful party in a suit, where such persons have a right so to enforce their claims, without the sanction of the law, would imply an excessive use of the authority conferred by the State, and could not by any means be justified by the argument that by the law of another State other officials or private persons had different rights.

Civil procedure, also, in the narrower sense in which it is terminated by the sentence of the judge, can only proceed in the forms prescribed by the law of the country where the court is.

In the first place, as a matter of fact, it is plain that it will be impossible to observe many of the forms required at the place where the contract was made or the parties were domiciled, because the State before whose court the process depends has not the public arrangements and officials necessary for the purpose; but it is besides quite inconsistent with the whole nature of civil procedure to apply foreign forms of process, although it might be perfectly possible in a particular case. The whole end and object of procedure is to persuade the court that the rights which are claimed or challenged do or do not exist, and as, in the case of an individual, persuasion is only possible according to the peculiarities of that individual, the State, in the same way, represented by its courts of justice, can only allow itself to be persuaded according to the peculiar regulations under which it has placed itself.

It would appear as if we must be contented with laying down this rule,—viz., that in the law of procedure we can apply only the law of the country where the court lies,<sup>1</sup>—furnishing also an answer to the question whether certain rights and duties connected with methods of procedure are or are not exclusively applicable to the natives of that country. But, on closer consideration, the following questions are found to be part of our subject. Many laws are only apparently rules of procedure, but, in truth, are material laws, or, at least, are so mainly.<sup>2</sup> For, just as in older systems of law, legal relations are very frequently embodied in the forms of judicial procedure, so it is far from uncommon, even at the present day, to explain the legal import of particular facts by the form in which they must be presented in pleading before

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<sup>1</sup> Cf., e.g., Bald Ubald, in L. 1 C. de S. Trin.; Burgundus, v. 1; Rodenburg, ii. p. 1, c. 5, § 16; J. Voet, in Dig. 5, 1, § 51; Mevius, in Jus. Lub. Proleg. qu. 4, § 6; Hert, iv.; Bouhier, chap. 28, v. 87; Boullenois, i. pp. 528, 544-45; Mittermaier, Arch. f. d. Civil Praxis, 13, p. 298; Massé, ii. No. 220; Seuffert, Comm. i. p. 260; Pardessus, v. No. 1496; Burge, iii. p. 1054; Wheaton, § 94, p. 125; Story, § 556; Thöl, § 77.

<sup>2</sup> The older writers distinguish between *litis ordinatoria* and *litis decisoria*. Cf. Paul de Castr. in L. 1 C. de S. Trin.; Rodenburg, ii. p. 2, c. 4, § 5; Boullenois, i. pp. 535-36; Mittermaier, as cited; Schöffner, p. 201; Heffter, p. 75.

a court, and according to the conditions and limitations imposed upon that presentation to the court. We must not deny to a law, which treats of the method of setting a right before the court, all influence upon the material legal relation which is to be discussed ; and if, for instance, it is enacted that a certain state of facts shall not be considered as valid either to found an action or to meet it, the result, of course, is to declare that that state of facts shall not give rise to any rights, a form of expression which rests upon the consideration that it is only such facts as can be in some way pleaded in an action, that can be said to have the character of legality at all. The question does not depend upon whether the law is on its face described as a rule of process, but rather whether its sole object is the determination and actual realisation of some legal relation which has already come into existence.<sup>3</sup> It is, therefore, another part of our task to exclude from the rule above stated all enactments which only apparently regulate the law of procedure.

The object which is in view—viz., the final determination and realisation of disputed private rights—cannot be attained in any other way than by allowing that the process itself shall confer new rights on the parties. If the final judgment is to determine finally the existence or non-existence of the legal relation in dispute, this cannot be reached in any other way, since all courts may err, than by holding that the force of such a judgment shall be to establish or to destroy the legal right contended for, although the facts on which it proceeds are false, or the conclusions drawn from them unwarranted. Is the judgment of the court of a foreign country to have this effect allowed to it, and, if so, under what conditions ? This question, too, must be answered in this division of our subject.

Lastly, it may very well be that some particular steps of a process can, as matter of fact, proceed only in a foreign State, and before its judicial officers. Then the question arises, whether these steps, taken in accordance with the rules of the foreign Government to whom they have been committed,

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<sup>3</sup> See, for instance, what has been said above (§§ 64 and 80) as to the limits of vindication and as to prescription of actions.

are to be recognised as valid in point of form by the court where the suit depends ; and, further, under what conditions a court, or any official who represents the judge,<sup>4</sup> is to carry out such steps of process as representative of a foreign power and at its request.

On the other hand, the subject of voluntary jurisdiction—*i.e.*, of the public authentication and confirmation of legal transactions on the one hand, and of certain police documents on the other, which do not, as a rule, take place exclusively before courts of law, but, in most States, to a certain extent, before other officials and persons holding a public authorisation, but with no magisterial power—does not come under the head of Civil Procedure. This much, however, may be said here on this subject.

It has been maintained that acts or documents of voluntary jurisdiction are to be recognised as valid in all countries if they have validity in the country in which they have been executed. But in truth we can lay down no general rule on that matter. Although the documents issued by an official in the due exercise of his powers, and under the sanction of all the forms required by the law of his country, make faith in any court,<sup>5</sup> it by no means follows that the document in

<sup>4</sup> In many States it is not the court or its officials, but certain other public officials, upon whom is laid the duty of carrying judicial determinations into execution. This fact has not, of course, any bearing upon the question to be answered here. The question to what officials or public body in any particular State the party or the foreign court should apply, is obviously dependent on the regulations of the State in question, and does not admit of any general answer.

<sup>5</sup> See Foelix, ii. p. 202 ; Story, § 632. No *publica fides* can be given in a foreign country to an official document if any particular form has been neglected, such as the subscription of parties, a case to which the law of the official himself attaches a nullity. Story, §§ 260-62a, and judgment of the Supreme Court of Stuttgart, 7th December, 1820 (Seuffert, viii. p. 812). There is no exception in the case of an omission of the stamps required by law, for we have not there to consider the grounds upon which this or that law will refuse *publica fides* to documents of an official nature. The Hanoverian regulations for procedure are to a different effect, 1850, § 231 : "Evidence taken before any foreign court may be admitted if it is good, either according to the legal forms there recognised, or to those prescribed by the present regulations on that matter." The *presumptio legalitatis*, a necessary result of *publica fides*, is to be claimed for documents issued by foreign officials just as

question is valid and effectual all the world over. That rather depends upon the local law which regulates the legal relation in question in its other aspects, in so far as the rule *locus regit actum* does not apply.<sup>6</sup> All that can safely be said is, that a deed of any official which is in proper form proves that he or some one in his presence at a particular time did a particular thing or made a particular deduction.

This *Publica Fides*,<sup>7</sup> universally attached to documents issued by the officials of a country within the limits of their jurisdiction, rests upon a universal law of custom, without which there could scarcely be any regular intercourse among the inhabitants of different States. We may assume that every civilised State will take care that its officers do not give any false testimony as to documents executed by them or in their presence. This portion of the law cannot, however, be referred to the rule *locus regit actum*: the notion of the headship of the emperor, and the derivation of all jurisdiction from him entertained in the Middle Ages, has contributed to it, and so, too, and in a substantial degree, has the general custom of putting officials on oath.<sup>8</sup> Every circumstance tends to show that the rule *locus regit actum* has more probably, on the other hand, arisen from the general recognition of the doctrine of *Publica Fides*.<sup>9</sup>

Before any *Publica Fides* can be given, of course the authenticity of the deed must be proved. Since the seal and subscription of the public officials are not sufficiently well known beyond the limits of their own country, this is effected by legalising the document by affixing the great seal of the sovereign<sup>10</sup> from whose officials the document proceeds, or by an attestation of its genuineness from the ambassador or

much as for those of officials in this country. See a judgment of the Cour de Rennes of 6th April, 1836 (Sirey, xxxv. 2, p. 55), and *supra*, § 32, note 11.

<sup>6</sup> Fœlix, ii. p. 187, maintains the universal validity of such documents, but he adds that the import of such a document must yield to the law to which the transaction in question, or the persons concerned, are subject.

<sup>7</sup> Cf. Merlin, Questions, Vo. Authentique (Acte), § 2. Fœlix, as cited; Massé, No. 269; Püttlingen, § 124; Code Civ. arts. 47, 170, 999.

<sup>8</sup> Fœlix derives it from the rule *locus regit actum*, ii. p. 201.

<sup>9</sup> See above, §§ 34-35.

<sup>10</sup> This as a rule proves itself. Story, § 643.

consul of the State in which it is to be used ;<sup>11</sup> the latter is the ordinary rule of procedure. But in cases of necessity there are other ways in which evidence may be led—*e.g.*, by witnesses ;—<sup>12</sup> and in adjoining States no particular proof of authenticity is required ; this is the case, as a rule, in the German States.<sup>13</sup>

Officials and notaries in many countries do not give the parties the original documents, but merely certified copies, and preserve the originals in their records. In my view, it is the law of the State whose officials have assisted in the execution or preparation of the document that must determine whether these copies are to make faith in another country or not.<sup>14</sup> The only question that can be asked is whether the official or notary is empowered to multiply documents executed in the presence of the parties without again requiring them to be present. If we were to require parties in such cases to produce the original papers, we would be asking for impossibilities, if it be the fact that the officials or notaries are forbidden to part with them. The English courts require proof of authenticity even in the case of these copies, because they are dealing with the value

<sup>11</sup> It depends upon the organisation of the officials of each State, and the agreements which have been made by one State with another, whether any other officials of a State must authenticate the documents issued by inferior officials and notaries before the diplomatic representative will authenticate them, and if so, which officials. See *Fœlix*, i. pp. 434-35. *Püttlingen*, as cited.

<sup>12</sup> *Story*, §§ 639-41.

<sup>13</sup> Judgment of the Supreme Court at Berlin, 23rd October, 1855 (*Striethorst*, 1856 series): "Diplomatic authentication is not in itself essential. . . . Where the authenticity of the document is clear from the weight of circumstances, and requires no special proof, and there is no ground for suspecting it, then no further process of authentication seems to be required. The instructions given by the ministers of justice and of foreign affairs on 22nd March, 1833, rest on this principle." (*V. Kamptz. Jahrbücher für die Preussische Gesetzgebung*, vol. xli. p. 220.) *Renaud*, *Wechselrecht*, § 7, note 18. In England, no special authentication of documents from foreign admiralty courts is required. They are held to be courts of the law of nations, and their records obtain faith everywhere. But since these courts derive their authority from some particular Government, the true reason probably is that documents and records of this kind are often produced before admiralty courts in England, and therefore the seal and subscriptions are so well known, that to prove them would be a useless formality, and one that would impede commerce.

<sup>14</sup> *Fœlix*, ii. § 305, p. 25.

which the documents are to receive as evidence,—and that is to be determined according to the *lex fori*.<sup>15</sup>

In the case, too, of documents which were originally executed by private persons, or rest upon their testimony, but make faith in public by virtue of some solemnity performed by a public official, the authenticity which is accorded to them by the law of the place where they were executed is to be recognised in foreign countries also.<sup>16</sup> It can make no difference whether it is an official or a private person to whom the State accords public faith under certain conditions ; the only distinction between them is that under the supposed conditions one enjoys *publica fides* temporarily, the other permanently. It must, however, be proved or be notorious that this exceptional power really has been given.

Lastly, it is incorrect to say that an act of voluntary jurisdiction can ever become a real law-suit,<sup>17</sup> although in cases where we have to do with an act of police,<sup>18</sup> parties interested in it may make representations, offer proof, and raise objections before the court according to the forms of true actions at law ; while, if the proposed act requires that the persons concerned shall be vested with certain rights,<sup>19</sup> the intimation of the intention of these persons to execute that act may be the occasion of a law-suit. It is, however, important to refute this contention, because in international intercourse an entirely different treatment of acts of contentious and of voluntary jurisdiction is observed.

## II. THE PARTIES : THEIR LEGAL REPRESENTATIVES AND ADVISERS—*Persona standi in Judicio*.

### § 117.

(1.) The capacity of pursuing an action or of defending one in court is, in so far as it is an effect of general legal capacity

<sup>15</sup> Story, § 635e.

<sup>16</sup> Massé, p. 355; and the judgment of the Court of Cassation at Paris, 6th February, 1843, reported there.

<sup>17</sup> Félix, ii. § 464, p. 199.

<sup>18</sup> *E.g.*, the procedure by which disposing power is withdrawn from a spendthrift.

<sup>19</sup> *E.g.*, the possession of a good title by the person who pledges real property.



and of capacity to contract, to be regulated by the law that determines that capacity.<sup>1</sup> It is a result of the general principle of the equality of natives and foreigners in the eye of the law—that no foreigner, simply because he is a foreigner, will be denied legal remedies. In time of war the Government<sup>2</sup> must proclaim that the rights of alien enemies to sue are suspended.<sup>3</sup>

On the other hand, it is a mere question of form, and, as such, dependent on the *lex fori*, whether a party can carry on a process of law in person, or must avail himself of the machinery appointed for that purpose—*i.e.*, solicitors and advocates ; and also whether a party can sue alone or requires the concurrence of certain persons.<sup>4</sup> This law, in the same way, will decide whether written or oral pleadings are competent.

(2.) The question as to whether the pursuer has a good title to make the claim in question against the defender, apart from its objective existence—*i.e.*, *legitimitas ad causam*—is dependent upon the law to which the legal relation in question is subject. In particular, the *lex fori* will not decide whether the pursuer must make his claim in his own name and right, or as an assignee ; that question depends for its solution purely upon whether it is possible to transfer to other persons the right which is in dispute, or the privilege of exercising it.<sup>5</sup>

(3.) The mutual obligations of the parties, in so far as they arise from the suit, are to be determined by the *lex fori* ; so, too, is the obligation to make good the costs of process, and to find caution for expenses.<sup>6</sup>

<sup>1</sup> See Fœlix, i. p. 86 ; Story, § 77 ; Schäffner, p. 204 ; Judgment of the Supreme Court at Wolfenbüttel, 20th Jan. 1858 (Zeitschrift für Rechtspflege im Herzogthum Braunschweig, 1858, p. 81) : "The question whether a father is bound to allow himself to be sisted in a process for his daughter, who is *in familia*, must be determined by the law of the domicile."

<sup>2</sup> See *supra*, § 27, note 12, and § 115 *ad fin.*

<sup>3</sup> For the view taken by the French courts, that foreigners have no right to sue each other there, see *infra*, § 118, and note on that section.

<sup>4</sup> See remarks on the guardianship of women, *supra*, § 53, and Schäffner, pp. 204-05 ; Linde, Civil Process, § 41, note 4.

<sup>5</sup> See *supra*, pp. 303-04.

<sup>6</sup> P. Voet, x. § 8 ; Schaffner, p. 202.

It is a disputed question whether, where the law requires a pursuer who is a foreigner to find caution for expenses,<sup>7</sup> this rule is to be applied where the defender is also a foreigner. The French practice has laid it down that the right to demand that a foreigner shall find caution belongs to the *droits civils*,<sup>8</sup> which no one but a French subject, or a person domiciled by the license of the Government in France, can exercise. But the special obligation laid upon foreigners to find caution, which exists in almost all countries in spite of the equality established between foreigners and natives in all other legal relations, rests simply upon the fact that the foreigner can more easily withdraw himself from the execution of the sentence of the court, and put the defender in a specially disadvantageous position, which is remedied by requiring caution. The fact which is most strongly pressed as showing that it is a special privilege of natives to require caution—viz., that a foreign defender needs not to find caution although he may cause expense to his opponent just as much as a pursuer, and withdraw himself as easily from diligence for its recovery—is to be explained by the naturally advantageous position of the defender. It would obviously outrage all feelings of justice to allow judgment to go against a foreigner just because he was not in a position to find caution. Since, therefore, the obligation to find caution is founded, not on any privilege, but on the disadvantages to which a foreign defender may be exposed, the right of requiring caution cannot be refused in cases where one foreigner is suing another, and a distinction of this kind cannot be read into the law if it is not therein expressed.<sup>9</sup>

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<sup>7</sup> See Code Civil, art. 16; Code de Procédure Civile, art. 166; Hannoverische bürgl. Processordnung, 1850, § 54.

<sup>8</sup> See the Arrêts du Cour de Pau, 13th Dec. 1836 (Sirey, 36, 2, p. 362); Cour d'Orléans, 26th June, 1828 (Sirey, 28, 2, p. 193); Fœlix, i. p. 291; the judgment of the Court of Cassation of 15th April, 1842, reported there at p. 294; and Gand, No. 325. [C. de Nancy, 14th June, 1871; C. de Douai-Auckaert v. Delmoitiez, 28th June, 1877. No length of residence will give a foreign defender who has no Government authority to live in France, the right to require caution from a foreign pursuer.]

<sup>9</sup> For the view taken in the text see Demangeat on Fœlix, i. pp. 293, 297; Massé, p. 336, note 1, and the authors there cited; also a judgment of the

The defender, however, who seeks a legal remedy against a judgment, or challenges the validity of an arrestment, is not to be held to be a pursuer, although in such procedure he may formally be so ; for there is no doubt that such a defender is substantially within the protection accorded to defenders,<sup>10</sup> while his opponent must certainly find caution for expenses.<sup>11</sup>

(4.) We need not set out at length that the *lex fori* must determine the competency of conjoining several persons as pursuers or defenders, and of introducing other persons besides those who were originally concerned into the process.

(5.) The rights and duties of the legal advisers with a licensed position, and of procurators in a suit, will be regulated, as far as questions with foreigners are concerned, by the law that is recognised at the seat of the court where they hold their position. Although the representation of the parties, and the introduction of legal advisers into an action, rest in every case upon a contract, the powers of solicitors and advocates really rest upon a license conferred by the State, and in some respects may well be compared to a public office. No party need contend, therefore, that he may settle the cost of his representation by such persons in any other way than is sanctioned by the law that prevails at the seat of the court : parties subject themselves to the dues there exigible.<sup>12</sup> On the other hand, we can imagine a case where the mandate given to a solicitor would have to be determined by the law of the domicile of the party, and not by that of the seat of the court, although we may have as a general rule to assume that there has been a submission to the law recognised at the place where the authority was con-

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Supreme Court of Appeal at Cassel, 14th Oct. 1856 (Heuser, Annalen, 4, p. 688). [Cf. also D'Ernesti v. D'Ernesti, 11th February, 1882, 9 R. 655.]

<sup>10</sup> See Fœlix, i. pp. 392-93, and the judgments of French courts reported there.

<sup>11</sup> Fœlix, i. p. 395.

<sup>12</sup> As a matter of fact the taxation of an account for services rendered can only take place before the court where the solicitor or advocate has done his work.

ferred, if it was so conferred, at the seat of the court, or according to forms in use there.<sup>13</sup>

*Note V, on § 117.*

[In England, a plaintiff may be required to find caution if he is beyond the jurisdiction of the court, unless that absence is merely temporary; and it would seem that such caution may, in the discretion of the court, be required even in cases where the defender is also a foreigner. By the law of Scotland, a foreign pursuer "is required to provide a mandatary resident in Scotland, to be responsible to the Court for the conduct of the cause, and to the opposite party for expenses in which the mandant is found liable" (Mackay, *Practice of the Court of Session*, i. p. 458). This rule is applicable even to a Scots pursuer resident abroad, or leaving Scotland during the dependence of the suit. If he is resident in England or Ireland, he is not required to do so, unless there are some other circumstances than his absence from Scotland that render it proper he should do so (Lawson's *Trs.* 1 R. 1065, 20th June, 1874). The order to sist a mandatary is entirely in the discretion of the Court, and the considerations in respect of which such orders are made seem to apply none the less forcibly in cases where the defender as well as the pursuer is a foreigner. (Cf. D'Ernesti, *ut supra*, p. 505.)

By the Civil Processordnung applicable to the German Empire, a foreign pursuer must find caution for expenses if required to do so, unless (1) a German is entitled to sue in the courts of the pursuer's country without caution; (2) there are counter-claims depending elsewhere; (3) the action is brought in consequence of some public notice or summons—*e.g.*, a call to lodge claims in a bankruptcy; (4) the question is as to some right dependent upon entries in a register

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<sup>13</sup> By the Hannoversche Processordnung (8th Nov. 1850), § 72, the procurator who has general authority has power to compromise, while the contrary is the case with the common German law of procedure. Cf. Bayer, *Vorträge über den gemeinen ordentlich. Civil Process*, 8 ed. p. 349. The *lex fori* determines whether it is necessary that the authority should be proved.

in the hands of German authorities ; or (5) the claim is liquid and fully vouched.

In France, in addition to what is laid down in the text, decisions have established that caution will be exacted from a foreign pursuer, except in *re mercatoria* (C. d'Aix, Gauthier *v.* Falkry Bey, 4th June, 1877, Criminal Cour de Cassation, 3rd February, 1874) ; but where a foreigner appeals, caution not having been required from him in the first instance, it cannot then be required (Bonaparte Wyse *v.* Carter, C. d'Aix, 9th July, 1874), nor from a foreign defender who appeals against a judgment of an inferior court (Levy *v.* Neu, C. de Nancy, 18th August, 1875). When a foreigner comes into a French court for an exequatur upon the judgment of a foreign court, he is required to find caution, just as the pursuer in an ordinary action is (Dreich, C. de Nancy, and Trib. Civ. de la Seine, 22nd January, 1876) ; but this is not so in cases where the judgment is upon *res mercatoria* (Société Générale d'Assurances de Transport de Reims *v.* Société d'Assurances de l'Univers, Trib. Civ. de la Seine, 18th Nov. 1875).]

### III. JURISDICTION—COMPETENCY OF COURTS TO DEAL WITH THE PROPERTY OF FOREIGNERS—RIGHT OF FOREIGNERS TO APPEAR BEFORE THE COURT.

#### § 118.

All rules as to the business of the courts, questions as to what suits—in an objective sense—can be submitted for judgment, and the rights and duties of the court to parties, belong truly to public law. It is, then, plain that we have nothing to do here with applying any other law than the law of the place where the court is situated ; and, for instance, the foreigner who at home has certain privileges in particular suits, or in all, cannot claim these on that account in a foreign country.<sup>1</sup>

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<sup>1</sup> Fœlix, i. § 126. Parties have no right to appeal to arbitration, unless that be specially accorded them, although that may be the rule according to the law to which the legal relation in question is subject (Fœlix, as cited, Note 1). It cannot make any difference that a State, by a special commission, has invested some person temporarily with the position of a judge in place of the officials who are permanently engaged in such work. If, then,

The competency of the court to deal with any particular thing—in a subjective sense—is in the same way to be determined by the law of the place where the court lies. The rules that have to be considered here belong also to public law, and simply import an allocation of all the suits that may occur in the country to particular courts, in which, no doubt, the will of the parties may have a considerable influence. But it is quite a different question whether the statutory rules as to competency are to be applied indiscriminately, whether the parties are natives or foreigners, the things in dispute situated in this country or abroad, the contracts in question concluded here or elsewhere, or to be fulfilled here or in another country. In Germany, England,<sup>2</sup> and the United States, in so far as the common law of England is there recognised, the question is in practice answered in the affirmative. A court which is competent when both parties are natives is just as competent when both are foreigners, if that is consistent with the facts necessary to give the courts jurisdiction;<sup>3</sup> and the only exception recognised is when jurisdiction is founded on some advantage conceded to a native pursuer, as in the case of arrestments.<sup>4</sup>

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a commercial association is formed under the provisions of the French Code de Commerce, no member of that association can, by an appeal to the provisions of the 51st article of the Code, demand a court of arbitration in a foreign country if the ordinary courts have jurisdiction in such matters. Massé, No. 290, is of a different opinion.

<sup>2</sup> See Fœlix, i. p. 309; Wheaton, § 140, p. 189; Story, §§ 541-42. The same has been held, according to Fœlix, in Spain. There is no theory in Germany, so far as I know, on this subject. See, however, the special regulations in the ordinance as to procedure in Baden, 1832, § 45 (reported by Fœlix, i. pp. 310-11).

<sup>3</sup> It is not impossible even to reconcile the *forum domicilii* with the fact of both parties being foreigners, if the competency of the court does not depend upon the acquisition of a right of residence, but rather upon what may be the customary place of residence of the defender. See Hannov. bürgerl. Processordnung of 1850, § 5.

<sup>4</sup> See Peck, de jure sistendi, c. 1, 2; Bayer, Theorie der summarischen Poesse, § 24, note 7; Spangenberg, in Linde's Zeitschrift für Civilr. and Process. iii. p. 431, note 2; Baumeister, Hamburg. Privatr. i. § 13, p. 87; judgment of Supreme Court of Appeal at Jena, 12th November, 1835 (Seuffert, 5, p. 68); judgment of Supreme Court of Appeal at Cassel, 26th Oct. 1842 (Heuser, Annalen, i. p. 888). It was also merely in favour of the French creditor that the statute of 7th April, 1832, introduced provisional

Modern French practice,<sup>5</sup> on the other hand, proceeds upon the principle advanced by the older French jurisprudence—that disputes between foreigners did not in themselves belong to the competency of French courts, and must, therefore, be rejected by the courts of their own accord, except in certain special cases.

It has been urged against this theory, which is not founded upon any special provision of the statute book,<sup>6, 7</sup> that since the State allows foreigners to acquire and to exercise rights in France, the necessary and immediate result is that there must be some judicial protection for them; and that the rule adopted by French practice, which refuses foreigners such judicial protection, is at variance with the principles of international law.

But although that practice cannot be defended upon the theory that it is a special privilege of natives to enjoy the right of appealing to the courts of their own country in suits against foreigners,<sup>8</sup>—a theory which is at variance with the principle of the legal equality of foreigners and natives in matters of private law, and would, unless countless exceptions were allowed, make any extended intercourse with foreign countries almost impossible,—there seems to be a more reasonable consideration on which it can be defended,<sup>9</sup> which takes

arrestment for foreigners. Gand, Nos. 609, 701; Massé, No. 196. We may lay it down that a French creditor, who is so merely *cessionario nomine*, cannot use this privilege, but may if he has acquired right to the debt by indorsation. Two judgments of the Supreme Court at Lübeck, on the other hand, 14th Sept. 1850, and 13th Jan. 1857, give the assignee who is a native this privilege.

<sup>5</sup> See Fœlix, i. p. 314, especially the judgment of the Court of Cassation at Paris, 22nd January, 1806, which has regulated subsequent practice. The course of practice in Belgium is the same (Fœlix, i. p. 317, note 1).

<sup>6</sup> Fœlix, i. § 150, p. 315.

<sup>7</sup> Wheaton, § 141, p. 189; Fœlix, i. § 146 (p. 307); Mailher de Chassat, No. 130.

<sup>8</sup> The argument which has been advanced, although it has little foundation in fact, that the courts of the country would be too heavily burdened with suits between foreigners, and that the suits of their own subjects would suffer (Gand, No. 187), is refuted by Demangeat, on Fœlix, i. pp. 322-23.

<sup>9</sup> Pütter, *Fremdenr.* p. 110, holds this rule to be an invention of advocates devised in order to furnish means of defending their clients.

that shape only in consequence of a peculiarity in the modern French law of procedure.

According to the law of procedure in France (adopted in other modern systems), the incompetency of the court, if it has jurisdiction in general over subjects of the same kind, only gives rise to a plea in the mouth of the defender: the court has no power, as in the common procedure in Germany, of its own motion to throw out the action, if there be a want of jurisdiction.<sup>10</sup> This maxim creates no difficulty in suits among natives; the State can lay on its subjects the duty of answering provisionally to a citation in an incompetent court. But, on the other hand, it is not easy to see how the State can so cite a foreigner who has no property in this country, and does not reside here, or conclude contracts here: for the right of jurisdiction really rests upon a subjection either of the person or of a thing belonging to him to the sovereignty of the State.<sup>11</sup> The object of the French practice is to restrain this encroachment upon the sovereign rights of other States,<sup>12</sup>

<sup>10</sup> Code de Procéd. art. 168. See, too, Hannov. bürg. Processordnung, § 19.

<sup>11</sup> Vattel, ii. chap. 8, § 103. Huber, *de foro competente*, § 28: "*Summa regula fori est hæc, quod actor forum rei sequitur. . . . Cujus ratio non tam est quod reus actore favorabilior. . . sed quod necessitas vocandi et cogendi alium ad jus æquum non nisi a superiore proficisci queat, superior autem cujusque non est alienus, sed proprius rector.*" Story, § 539, *ad fin.*, remarks: "No sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals."

<sup>12</sup> The 14th article of the Code Civil—viz., *L'étranger même non résidant en France, pourra être cité devant les tribunaux français pour l'exécution des obligations par lui contractées en France avec un Français; il pourra être traduit devant les tribunaux de France pour les obligations par lui contractées en pays étranger envers des Français,*" contains, as even French jurists admit (Fœlix, i. p. 324), an invasion of the principles of international law, and rests upon an inadmissible analogy, which seems to be drawn from a practice that can quite easily be defended on principles of international law—viz., arrestment against foreigners (see *infra*, No. 8, § 119), and from the natural desire to protect the interests of its own subjects, which is here carried too far. The absolute application of the rules of French procedure to determine the competency of suits which two foreigners proposed to conduct against one another could never be so justified. The last provision of this article is repealed in Baden, Hesse, and Rhenish Prussia, and only the right of reconvention retained. It still remains in the rules of process of the Netherlands. (Cf. Fœlix, i. pp. 385-87, 380.)



and especially to obviate the abuses which might take place in suits between foreigners under the foregoing provision of the French Code of Procedure.<sup>13</sup> This was only possible, however, even under the terms of that provision, if it was held to be the exclusive right of French subjects to pursue actions against foreigners in the courts of France. The French courts are allowed to use their discretion in admitting or dismissing an action by one foreigner against another according to the circumstances of the case, and—apart from the case of an action to establish a real right in heritable property situated in France, where the principle of territorial sovereignty will give both a right and a duty to exercise jurisdiction, although the issue may be between foreigners,<sup>14</sup>—according to well established rules of practice, one foreigner can be sued by another, if payment of the obligation is to be made in France,<sup>15</sup> if the suit refers to commercial matters,<sup>16</sup> and if at the same time the conditions required by the 420th article of the *Code de Procédure* are present,<sup>17</sup> if the question is one as to the regulation of interim rights or of diligence,<sup>18</sup> in questions of succession,<sup>19</sup> in so far as the succession has opened in France or refers to real estate there situated, in actions of damages arising from delicts committed in France,<sup>20</sup> in cases where the defender has chosen a domicile in France for the property which is in question, or has really acquired

<sup>13</sup> It should be remembered, for instance, that if the defender has no known domicile in France, by the 69th article of the Code of Procedure it is sufficient for the purpose of citation to post the document of citation on the walls of the court, and to deliver another copy to the Procureur Impérial.

<sup>14</sup> Gand; No. 201; Fœlix, i. § 160, p. 334.

<sup>15</sup> Fœlix, i. pp. 325-26.

<sup>16</sup> Fœlix, i. pp. 327-28. The reason assigned is undoubtedly wrong. Commercial matters, since we have no *jus gentium* in the sense of the Roman law (see *supra*, § 2, note 2), belong to the *jus gentium* just as much and no more than other assets of private property affected by a suit.

<sup>17</sup> “*Le demandeur pourra assigner à son choix, devant le tribunal du domicile du défendeur, devant celui dans l’arrondissement du quel la promesse a été faite et la marchandise livrée; devant celui dans l’arrondissement du quel le paiement devait être effectué.*”

<sup>18</sup> Fœlix, i. pp. 313-16.

<sup>19</sup> Massé, No. 177; Fœlix, i. p. 344.

<sup>20</sup> Fœlix, i. p. 334, note a, and p. 335.

an actual domicile there,<sup>21</sup> or, lastly, is resident in France without being able to show a real domicile in any other country.<sup>22</sup> (On the other hand, French courts will never adjudicate in cases where the civil status of foreigners is concerned.<sup>23</sup>) It is plain that in reality the requirements of commerce are completely satisfied, and what looks like an infringement of the legal equality of foreigners and natives is in truth only a protection against fraud, although it may lead to serious consequences if it is defended on wrong grounds.

*Note W, on § 118.*

[The courts of England, Scotland, and Germany recognise no peculiar right in their own subjects to sue before them to the exclusion of suits between foreigners, provided that there is present some ground of jurisdiction upon which they can proceed—*e.g.*, in England personal service upon the defender, in Scotland arrestment of his goods *jurisdictionis fundandæ causa*, in Germany residence coupled with personal citation. We shall discuss more closely, *infra*, what are the grounds on which jurisdiction may be founded; at present we need only note that if these conditions are satisfied, the defender is not entitled to plead that both he and the pursuer are of foreign nationality or domicile, nor will the courts of the countries named take *proprio motu* any such objection; in Scotland, however, the plea of *forum non conveniens* may be advanced in such cases, and will be sustained if the court is satisfied that the case will be more conveniently disposed of elsewhere. But that convenience must be distinct and preponderating, otherwise the court will proceed to adjudicate on the question, in conformity with the doctrine laid down by Inglis (L. J. C.) in *Clements v. Macaulay*, 16th March, 1866, 4 M.P. 593: "It must never be forgotten, that in cases where jurisdiction is competently founded, a court has no discretion whether it shall exercise its jurisdiction or not, but is bound

<sup>21</sup> *Fœlix*, i. pp. 325, 317. Cf. Code Civil, art. 111.

<sup>22</sup> *Fœlix*, i. pp. 321, 332, note *a*.

<sup>23</sup> *Fœlix*, i. 329-32. The matter is different if these questions of status are merely an incidental point. *Fœlix*, i. p. 338; *Massé*, No. 174.

to award the justice which the suitor comes to ask. *Judex tenetur impertiri judicium suum.*" This maxim is at the bottom of the doctrine advocated in the text.

We may illustrate further the exceptions which French practice has lately been driven to recognise to the rule that French courts shall not entertain suits between foreigners. A writer in the *Revue du Droit International* ranges the exceptions under the following categories; such suits are allowed to proceed,—(1) When either party is naturalised; (2) When an international treaty has sanctioned the practice; (3) In civil suits founded on delicts or quasi-delicts; (4) In suits *in re mercatoria*; (5) In suits where the judgment is to be merely provisional, or to maintain a *status quo* pending a suit abroad; (6) Where the status of foreigners is fraudulently acquired by either party; (7) Where there is a plurality of parties, one of them being French; (8) Where the suit originally depended with a French subject as pursuer or defender, and a foreigner has been sisted in his room *pendente processu*. It may be noted here, although the remark is more germane to the subject of jurisdiction, that the French Code authorises French subjects to sue foreigners in France, to demand justice from their own courts as it is phrased, even although these foreigners do not reside there, and although the obligation sued on was contracted abroad, and is to be satisfied abroad.

The following decisions will show what is the kind of cases in which French courts have entertained suits between foreigners; we have already seen (*supra*, note M, p. 385) that courts which decline to exercise their jurisdiction so as to affect permanently the conjugal relations of spouses, will award aliment and the custody of children, and we shall see (pp. 536-37) that they will sustain arrestments used by foreigners against foreigners, although the question for the decision of which, and for consequent execution these arrestments have been used, is beyond their jurisdiction. The pressing nature of the appeal to their protection justifies this course, and on similar grounds an English servant has been allowed to sue her employers—foreigners resident in Paris—for wages due to her (*Morris v. Rizardi*, Trib. Civ. de la Seine, 31st May, 1878); so, too, an Italian sailor, who had been engaged at

Marseilles, before the English Consul, by an English Shipping Company, may sue his employers for damages for personal injuries in Marseilles, that port being the place where his wages were to be paid to him (*Becchré v. St. Andrews Company*, Trib. Comm. de Marseilles, 15th May, 1878). Generally, in commercial questions arising in France, French courts have jurisdiction (*C. de Lyon, Herard v. Adhémar*, 19th May, 1876): actions will lie if the place of payment or performance is in France, or if the cause of action has originated there—*e.g.*, if the goods for the price of which action is brought were supplied there. This was held in the case of an action for furnishings supplied by an English house to an English ship driven into a French port by fire (*Neilson v. Longley*, 16th November, 1874, C. d'Appel d'Alger). The principle is thus stated in a judgment of the Trib. Civ. de la Seine (*Fuentes v. Peiger*, 13th July, 1877): "French law, permitting, as it does, foreigners to enter into all contracts *juris gentium* with Frenchmen or foreigners in France, tacitly promises them the means of compelling execution of these upon the stipulated conditions; the necessity of maintaining order, and supporting the good faith due to contracts, ought to give jurisdiction in suits between foreigners upon contracts made in France, and intended to be enforced there." The same principle had been applied in the cases of *Pritz v. Schenking*, 30th November, 1875, by the Civil Tribunal of Nice, and by the Court of Cassation at Paris, on 22nd November, 1875, in the case of *Mohr v. Quien-Haldy*. In a patent case, too, the patent being French, the courts of France will adjudicate between foreigners on the ground that the regulation of such a matter belongs to the maintenance of public order, and cannot be committed to a foreign court (*Paris Skating Rink Company v. Spiller*, 26th June, 1879, Trib. Civ. de la Seine).

It has been held, upon the other hand, that the incompetency of French courts is not absolute, and that parties acquiescing, the court may, if it thinks fit, exercise jurisdiction between foreigners (*Mazy v. Mazy*, C. de Cassation, 5th March, 1879), and that a foreigner long established in France, but not of French nationality or domicile, may sue another foreigner in the French courts (*Monte Naro v. Comp. Italo Platense*, Trib.

Comm. de Marseilles, 17th March, 1875), and the same has been held where a foreign company long established in France was pursuer (*Cie Segovia Ceradra*, Trib. Civ. de Marseilles, 16th March, 1875). These cases may, however, have fallen under some of the numerous exceptions to the general rule already stated.

On the other hand, French courts have refused, even when parties prorogated their jurisdiction, to exercise it for the decision of questions of personal status between foreigners,—*i.e.*, any but naturalised French subjects,—on the ground that their remedies exist only for their own subjects. They have thus refused to determine a suit between Zanchoni, tutor to the minor children of the Prince of Lusignan, and other foreigners, relative to the right of the children to bear the title (Trib. Civ. de la Seine, 5th May, 1880), or a declarator of right to bear a certain name and title raised by a Hanoverian against a Russian (*Catana v. Potecki*, 7th May, 1875, C. de Paris). This absolute rule may, however, be overcome by special circumstances of convenience (*De Patton v. Bikowski*, Cour d'Aix, 25th January, 1876).

The Belgian courts will sustain their jurisdiction when the subject matter springs from a contract that should be executed in Belgium, or when the action is subsidiary to one already depending in the Belgian courts. This jurisdiction is created by a statute of 25th March, 1876, and is fortified by decision (*Preve v. Van de Taelen*, 30th May, 1877, Trib. Comm. d'Anvers).]

#### MUTUAL RECOGNITION OF JURISDICTION IN INTERNATIONAL INTERCOURSE.

### § 119.

Let us now inquire what kind of jurisdictions must be mutually recognised by different States, apart from positive enactments. The end and object of the judge's work is a final judgment, and accordingly the character of this judgment will determine the sphere of his work, and will serve as a test of competency.

The sentence of a judge, however, although in strict logic and in accordance with principles of law and with facts it does

not create or destroy legal rights, has nevertheless practically that effect on account of the possibility of error : its effect comes to be that of a *lex specialis*<sup>1</sup> upon the case which it determines, although that is not its object. Whether the *lex specialis* of this or of that State is applicable to the particular case, must depend upon what *lex generalis*, that is, what local law, is generally regulative of the legal relation in dispute. The courts of the country to whose law the legal relation in question is subject must therefore rule.<sup>2</sup>

In questions, therefore, of status and family law, the *judex domicilii* will decide ; in questions as to things, the *judex rei sitæ*.<sup>3</sup> Suits as to succession will fall partly to the one and partly to the other ; questions as to obligatory contracts will belong partly to the *judex domicilii*, partly to the court of the place of the contract or delict.

This principle, however, undergoes two modifications—an extension in so far as the defender may consent to subject himself to the jurisdiction of another court, and a limitation in so far as the pursuer may renounce some particular jurisdiction ; but from this option there are of course excluded all

<sup>1</sup> The character of a suit as a contract, which is so often advanced, does not in my opinion fully exhaust the matter, since every process rests, directly or indirectly, upon compulsion.

<sup>2</sup> As we have seen (*supra*, § 24), many maintain that the converse is the true principle, and that the jurisdiction in any particular case will determine what law is to be applied. No doubt the judge must follow the statutes of his own country. The question is, however, whether, if the subject or the object of the judicial sentence is in another country, the legal position is affected by that sentence, and whether there is not involved in the instructions given to the judge by the statute an encroachment upon the sovereign rights of other States.

<sup>3</sup> The *actiones in rem scriptæ*, in so far as they are directed to the delivery of particular articles, give the pursuer a real right, since the true test of a real right is its operation against third parties. These actions are set on the same footing as the *actiones in rem*, under the restriction already mentioned, in so far as the competency of the court is concerned, in the treaties attested by Krug (pp. 40-41), and in the draft of a General Code of Jurisdiction in the States of the German Bund. The same rules will apply to actions for division and possession in so far as these apply to particular articles. (Cf. § 15 of the Draft Code, and Krug, as cited.)

legal relations over which the parties have not a full power of disposal.<sup>4</sup>

The acquisition of an actual domicile must count as a voluntary submission of all legal relations that are subject to a free power of disposal to the courts of that country, excepting only real rights in heritage, and such moveables as are permanently attached to any particular place.<sup>5</sup> The foreigner who sets the centre of his affairs and of his life as a citizen in another place, thereby recognises the protection which is afforded to him by the law of that place, and the courts that are established there. If he should require the pursuer to follow him to the *forum* of his previous domicile in any action dealing with things that are at the free disposal of the parties, because the case has somehow had its origin there, such a demand, giving no advantage to the defender, but likely in most cases to be troublesome to him, would be declared to be *ex dolo*, and therefore would be refused.<sup>6</sup>

Conversely, however, if the defender has left his former domicile, or the place in which he came under the obligation in question, or acquired the property which is claimed, and has no more belongings there, the pursuer has no right to appeal to the jurisdiction of that place. He could have enforced his rights sooner, at a time when the defender could

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<sup>4</sup> In questions, therefore, as to the validity of a marriage, or its dissolution, that court only is competent in whose territory parties have their legal domicile (see *supra*, § 92). Section 34 of the second Draft for the States of the Bund provides:—"The present statute is only applicable to actions that have to do with personal status—the constitution, existence, or dissolution of marriage—if the person concerned belongs exclusively as a subject to the State where the process is proposed to be brought; and that whether the action deals with one of these legal relations itself, or merely with legal rights or obligations that flow directly from some judgment of the court adjudicating upon one of them.

<sup>5</sup> See *supra*, pp. 230, 235, 246.

<sup>6</sup> The foreigner as a rule does not possess any property at his old domicile. If the pursuer had to betake himself to the court of that old domicile, the debtor would remain untouched in his new domicile if the sentence of the court of one country could not be carried out in the other, —would, as a judgment of the Parliament of Paris expresses it, enjoy the property acquired at the expense of his fellow-citizens (Fœlix, i. p. 321). See, too, the preceding paragraph, note 22.

have met him there without any inconvenience, and if his right to that jurisdiction was in any peril, he was bound to use arrestments against the debtor or his property: *vigilantibus jura sunt scripta*. But an exception must be admitted in the case of obligations *ex delicto*; the person who has received damage must be allowed some more efficient protection than the creditor enjoys in other obligations which rest upon free will, and is all the more entitled to adhere to that jurisdiction which has once been established, irrespective of whether the person who has committed the delict lives at the place where it was committed, or has property there, as in many cases it is not known till afterwards who it was who did commit the delict. In this case the creditor is absolutely entitled to choose between the *forum delicti commissi* and the *forum domicilii*. The exclusion of the *forum domicilii* in real actions which deal with heritage is defended upon the ground that to assume any voluntary submission here is to contradict the modern theory of law, which distinguishes in many important aspects between moveables and immoveables,<sup>7</sup> and to go against the great and specially important distinctions between the various territorial laws on the subject, while the arguments adduced to support the voluntary subjection to the courts of the domicile in personal actions and real actions directed against moveables, do not correspond with the nature of the *materia subjecta* in the present case. By aid of this last consideration, and because the owner has divided these things from the rest of his property, we find that real actions, too, concerned with moveables which are permanently attached to some particular place, are only competent in the courts of that place. That this is so with real

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<sup>7</sup> According to Germanic legal theories, a man may unite several distinct personalities in himself by the possession of distinct estates (*e.g.*, by feudal and allodial holdings). The so-called *landsassiatu plenius*, which is recognised in some countries, but now is gradually disappearing (see Beseler, i. § 65, note 4), is explained to be a legal theory which holds the whole moveable estate to be a pertinent of the land. In older German law the *forum rei sitæ* is exclusive (see Land Law of Saxony, iii. 33, § 4; cf. Suabia, c. 75, § 1, c. 245, § 1, ed. Gengler; and the citations in Wetzell, Civil Process, § 41, note 47), and the Courts of Common Law in England and America still declare themselves of their own accord incompetent if the real estate is not within their jurisdiction. Burge, iii. p. 397.



actions that concern immoveables has been recognised by most authors and in most treaties.<sup>8</sup>

The nature of other moveable things, on the other hand, is such that their owner can, as a rule, settle their situation. As, then, upon the one hand, to require a pursuer, who demanded delivery of moveable property by means of a real action, to raise his action at the place where the thing is situated, would imply the greatest injustice, and would in many cases be nothing but robbery of a good right, since the pursuer could not know where the thing in question was ; on the other hand, if the defender might be sued in any place where the thing happened to be for ever so short a time, his defence would be greatly embarrassed, and the security of commerce in moveables would be thereby exposed to the greatest risks. Nothing, therefore, is more natural than that real actions for delivery of moveables should be brought at the actual domicile of the defender, and an exception is admitted only if the thing is permanently attached to a particular place by the dedication of its owner, or if the pursuer under special conditions — as in the case of arrestments—is entitled to detain them at some particular place.

Every one, then, so long as he is personally present in any State, is subject to the sovereignty of that State in so far as relates to his person, and so long as he possesses property or makes claim to property there, in so far as concerns that property and these claims. It is, then, not repugnant to principles of international law, that the debtor himself, if he happens to be in the country, should be seized, or his property arrested ; and in consequence a judgment can be pronounced without the necessity of establishing any other right of jurisdiction, giving decree—in the former case to the amount of caution required for liberation, in the latter to the amount of the value of the goods arrested. But in modern times this strict law of arrestment against foreigners

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<sup>8</sup> Burge, iii. p. 125 ; Vattel, ii. § 103 ; Wheaton, § 86, p. 118 ; Story, § 543. See, too, J. Voet, in Dig. 5, 1, n. 77 ; Mevius, in Jus. Lub. v. 2, note 5, §§ 3 *et seq.* ; the treaties cited by Krug (pp. 40-1) ; and the sketch of the laws of the States of the German Bund, § 15.

is less necessary, and has been limited in many countries as prejudicial to trade.<sup>9</sup>

Lastly, however, a defender who has no domicile at all must be content to answer in personal actions, and actions for the delivery of moveables (under the exceptions already considered), in the courts of the place where he may happen to reside. If he should appeal to the exclusive jurisdiction of another court, that can only be suggested by *dolus*, since he has no property within its jurisdiction, and it is more convenient for him that the action should proceed in the place where he lives.

#### THESE PRINCIPLES COMPARED WITH THOSE ADOPTED BY MODERN GERMAN LAW.

### § 120.

We shall now attempt to show that jurisdiction established on these principles is in accord, with but slight deviations, with the principles of Roman law, and also with these principles as developed in Germany, having regard always to the fact that now-a-days, where the question concerns the competency of the courts of different countries with systems of law which may differ very widely, many things are of importance which were allowed to remain unnoticed under a system like that of Rome, in which the questions of competency arose between the different courts of the same State subject to one and the same law.

We need only advert in this matter to the *forum domicilii*,<sup>1</sup>

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<sup>9</sup> The Draft Code for the Bund provides in article 10: "If arrestments have been used in any German State, the competency of the jurisdiction given by the law in respect thereof only justifies the principal action in so far as that process will be able to affect the subject arrested and any property of the arrestee that may be found in that country, and will only be admitted on condition that, if the arrestee when the arrestments were laid on was the subject of another German State, his character as a foreigner did not determine their use."

<sup>1</sup> By the common law, where parties have no actual domicile in the Roman sense, the place of residence was taken instead. See Wetzell, § 40, note 58. It does not seem imperative that this jurisdiction should in every case be

because by common law it was competent to bring real actions as to heritage in that court. This is to be explained in this way, that in old days there existed but one *forum* for all suits in which Roman citizens were defenders, and that was Rome itself. And in later times, when Roman citizens first came to be required to answer to actions in the provinces, they could not acquire any property in landed estate there; when, however, they did possess this right, and the *forum rei sitæ* came to be introduced, it did not seem to be of any moment, looking to the unity of the whole Empire, that the *forum domicilii* should also be retained for real actions as to landed property.

As regards the *forum rei sitæ*, we need only recall the fact that, according to the plain sense of the words of L. 3 (*ubi in rem actio*, 3, 19), this jurisdiction is only found where the property has a permanent resting-place, a doctrine in full harmony with the principles above deduced.<sup>2</sup>

In the same way, the *forum delicti commissi* accords with these principles.<sup>3</sup>

On the other hand, the *forum contractus* seems to embrace a far wider sphere in the common law than that which our reasoning would assign to it. According to the older view, this jurisdiction is established at the place where the contract was concluded, provided that the debtor is personally present there or possesses property there; but by a more modern view it exists in the place where the obligation is, either by implication or by express agreement of parties, to be performed,<sup>4</sup> and it does so, as many authorities think, even without requiring the personal presence of the debtor there, or the possession of any property by him.<sup>5</sup>

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described as the *forum arresti*, although in such cases there will often be arrestments. Cf., too, the Draft Code as cited, i. § 9, with the ideas on which it proceeds.

<sup>2</sup> As to the *actiones in rem scriptæ*, see Wetzell, § 41, note 45.

<sup>3</sup> See Wetzell, as cited, note 31.

<sup>4</sup> According to a theory which may now, however, be held to have been refuted by Savigny (§ 370; Guthrie, p. 200), the positive law would assign every obligation a place of performance.

<sup>5</sup> Cf. Bayer, Civil Process, pp. 200-01, and authorities cited there; and again, Savigny, § 371; Guthrie, p. 220; and the judgments of the Supreme

The first view, which would give jurisdiction to the law of the place where the obligation took its rise, has been completely refuted in modern times, and may now, in theory at least, be held to be abandoned.<sup>6</sup> There will be all the less necessity for reviewing the reasons by which it is supported, since all that I propose to say against the second view may serve at the same time as a refutation of the first.

The second view is supported by most writers on the ground that when a person undertakes to perform an obligation at any particular place, he thereby subjects himself to the courts of that place; and in the absence of any express stipulation or other agreement as to the place that can be inferred from circumstances, that is held to be the domicile of the debtor in the obligation.

Let us, in the first place, put aside the provisions of the Roman law, and test on general logical principles the question, whether by consenting to a particular place of performance, or even expressly providing one, there is always to be held to be a submission to the courts of that place; we can without difficulty figure cases in which this assumption will flatly contradict the intention of the parties. For instance, a person is engaged to accompany another on a journey from Berlin to Paris and Madrid; in determining the days on which they are to arrive at Brunswick, Hanover, Cöln, Paris, and so on, it is settled that he is to receive a stipulated sum at each of these places. Can we say in such a case that the debtor may be sued at any one of these places? And yet that would be the result of the view that is adopted, even although the whole journey should be left unfinished. But it is impossible without force to read into an agreement as to the place of performance a tacit prorogation of jurisdiction even in ordinary cases. For instance, a merchant in Hamburg, who undertakes to make a payment in Singapore through a correspondent there, can surely not be said thereby to indicate an intention to subject himself to the courts of that country, although it may

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Courts of Appeal at Lübeck, 20th June, 1839, and at Stuttgart, 5th September, 1854, which adhere to the condition required (Cf. Seuffert, 8, p. 121).

<sup>6</sup> Cf. Bayer, pp. 197-98; Savigny, § 370; Guthrie, p. 198; Wetzell, § 41.

be quite uncertain whether the court there will entertain an action.

Wetzell<sup>7</sup> remarks that the will of the parties cannot account for jurisdiction being given to the place of performance. Any one who was bound by a *negotium stricti juris*—e.g., by a stipulation, a loan, or a legacy (*legatum per damnationem* or *sinendi modo*)—says Wetzell, could originally only be sued for payment at the place of performance. For the strict form of the action did not permit any regard to be taken, or any pre-estimate to be made of the local interest, and in any other court the creditor might have demanded more than the debtor was bound to pay to him. It was no voluntary submission, but the strict local reading of the obligation that showed the *forum solutionis* to be the necessary *forum*.

This would explain the origin of the *forum contractus* as applicable to the *stricti juris obligationis*, but would not account for its application to all contract obligations.

According to what I hold to be the only true view, the matter stands thus: The Roman citizen in old times could only be sued in Rome in the court of the prætor; in those days there was but one jurisdiction for all Roman citizens, and on that account a *pluris petitio loco* could never arise. In later times, as the citizens of Rome spread more and more over the provinces, and took up trades there, they were obliged to answer in the courts of the magistrates of the provinces. The only persons, however, whom a magistrate could compel to answer in a suit by requiring caution, were persons who either were themselves actually present in his jurisdiction or possessed property there, by means of which a *missio in possessionem* of the creditor could be carried out.

The principle, that every one who was himself found in the province, or had estate there, could be sued in its courts by his creditors, was first reached in *actiones stricti juris* with a definite place of performance by this means,—viz., that an action instituted in any other place than the appointed place of performance was treated as a *pluris petitio*, the

result of which was dismissal of the action and loss of the right to recover. How was it, however, with other obligations, where a less strict reading of their terms did not impose such a penalty upon the pursuer? The defender was in this case also formally subject to the official authority of the magistrate, and the same was the case even as regarded *obligationes stricti juris* after the introduction of the *actio de eo quod certo loco*. In my opinion the limit lay in this, that the magistrate did not exercise his power of permitting action or compelling the debtor to answer unless *bona fides* required it. It is an important circumstance, no doubt, for determining whether in the particular case *bona fides* requires the debtor to answer to the jurisdiction, that payment is to be made at that place; but that does not in itself determine the question, since for instance the *forum domicilii* also affects all contract obligations, although payment may have to be made at some other place than the domicile of the debtor. But the principal consideration is whether the debtor was resident for some time in the locality where it is proposed that the jurisdiction over the contract should lie, so that both parties must have held that the beginning and the whole development of their transaction was to take place there. This result is confirmed by the direct authority of the sources of law.

The most detailed passage as to the *forum contractus* is L. 19, D. 5, 1: "*Heres absens ibi defendendus est, ubi defunctus debuit, et conveniendus, si ibi inveniatur nulloque suo proprio privilegio excusatur. § 1. Si quis tutelam, vel curam, vel negotia, vel argentariam, vel quid aliud unde obligatio oritur certo loco administravit, et si ibi domicilium non habuit, ibi se debet defendere, et si non defendat neque ibi domicilium habeat, bona possideri patietur. § 2. Proinde et si merces vendidit certe loco, vel disposuit, vel comparavit, videtur, nisi alio loci ut defenderet, conveniret, ibidem se defendere. Numquid dicimus eum, qui a mercatore quid comparavit, advena, vel ei vendidit, quem scit inde confestim profecturum, non oportet ibi bona possidere, sed domicilium sequi ejus? At si quis ab eo, qui tabernam vel officinam certo loci conductam habuit, in ea causa est, ut illic conveniatur? quod magis habet rationem. Nam ubi*

*sic venit ut confestim discedat, quasi a viatore emtis, vel eo qui transvehebatur, vel eo qui παραπλῆι (præternavigat), emit durissimum est, quotquot locis quis navigans vel iter faciens delatus est, tot locis se defendi. At si quo constitit non dico jure domicilii, sed tabernam, pergulam, horreum, armarium, officinam conduxit, ibique distraxit, egit, defendere se eo loci debebit. § 3. Apud Labeonem quæritur si homo provincialis servum institorem vendendarum mercium gratia Romæ habeat, quod cum eo servo contractum est, ita habendum atque si cum domino contractum sit: quare ibi se debebit defendere. § 4. Illud sciendum est, eum qui ita fuit obligatus, ut in Italia solveret, si in provincia habuit domicilium, utrobique posse conveniri, et hic, et ibi; et ita et Juliano, et multis aliis videtur.”*

The beginning of this passage provides that the heir must answer in judgment in the court where his ancestor could have been required to plead. This is a consequence of the representation of the ancestor by the heir in questions of property. Then it is noted in the first paragraph, that any person may be sued in that place where he has permanently<sup>8</sup> carried on business, upon all obligations arising in that business. The second paragraph lays stress upon the fact that the debtor has been in a particular place for no mere temporary purpose, although it is not necessary that he should be actually domiciled there. One who is on his travels cannot as a rule be sued in the different places in which he may make contracts upon his journey. The third paragraph lays down that one who has had a trading establishment in Rome, under the management of a slave, may be sued in Rome; and the last paragraph reminds us that the *forum domicilii* is always concurrent with the *forum contractus*. I will not dispute that as a rule an obligation must be performed where the *forum contractus* is, in conformity with this passage, settled to be. But it is quite conceivable that a traveller, for instance, may desire to repay a loan at the place where he has received it, or that a slave who contracts in Italy may stipulate that his master

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<sup>8</sup> Cf. too, the words, *at si quo constitit*, lower down in the paragraph, upon which plainly the decision turns.

should give delivery of the goods in the provinces. In my opinion, if it were assumed in the former case or disputed in the latter, that the *forum contractus* was the proper *forum*, the provisions of this passage, which say not a word, save in the last paragraph, as to the place of performance, would be plainly contradicted. We can explain the mention of the place of performance here in this way, that it is specially desired to give still more prominence to the concurrence of the *forum domicilii*, and therefore the words "*ut in Italia solveret*" must be construed as meaning, "assuming also that he is bound to pay in Italy," and the "*ita*" is to be carried back to the preceding paragraph. It is intimated that if a person has come under such obligations, as in the case just cited the slave has, and if we assume also that he is bound to pay in Italy, yet if he has his domicile in the provinces he may be sued in either place. According to the prevailing view, the words "*ita fuit obligatus, ut in Italia solveret*" are interpreted to mean that the agreement to pay in Italy is the condition of jurisdiction there. But plainly the fourth paragraph is in contrast with the preceding paragraphs, in which it has been already shown what considerations should serve to make us remember that the *forum contractus* is not exclusive, but is always concurrent with the *forum domicilii*; it would be quite inconsistent with this, if, after there had been no mention at all of the place of performance in the former paragraphs, this should now be taken as the true foundation of the *forum contractus*.

But if the word "*ut*" should not be taken in the sense we propose, it does not follow by any means as a necessary consequence from this passage, that in every case where payment or performance is to be made in Italy there should thereby be a *forum contractus* established there; for the word "*posse*" very fairly admits of the translation, that it may be the case that a person is bound to answer in two places: it may then be laid down, and that is no contradiction of my view, that as a rule the place of payment is identical with that in which the *forum contractus* is established. Then L. 3, D. 42, 5:—"Contractum autem non utique in eo loco intelligitur, quo negotium gestum est, sed quo solvenda est pecunia." Here, then, it is said the *forum contractus* is



determined simply by the place of performance. But in my view this passage would, without being forced, admit of this translation :—"That place in which the contract is concluded is not always to be considered the place of the contract, but that is only as a rule the case if the money falls to be paid there also." This is in full accord with the view I have adopted ; for if the whole transaction, from first to last, is intended by the parties to be in connection with one and the same place, it would generally offend against *bona fides* to propose to transfer part of the obligation to another place by appealing to a different *forum*. By the ordinary rendering the jurist is made to say that the *forum* is certainly not established where the transaction is concluded ; but this reading does not correspond with the outset of the passage. In Latin *contrahere* is the exact opposite of *solvere* ; the former indicates plainly the beginning, the latter the end of the transaction. If the place of payment were all that fell to be considered, it would certainly have been more natural to speak all along of the *forum solutionis* and to leave out the *contrahere* altogether.

In the same way I render the passage L. 21, D. de oblig. et art. 44, 7 : "*Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit* ;" thus : "It may be laid down that every person has contracted in that place in which he undertook the obligation and proposes to make payment" (*in quo se obligavit, ut (se eodem loco) solveret*).<sup>9</sup> The passage from L. 65, D. de judiciis, further says :—

"*Exigere dotem mulier debet illic, ubi maritus domicilium habuit, non ubi instrumentum dotale conscriptum est ; nec enim id genus contractus est, ut et eum locum spectari oporteat, in quo instrumentum datis factum est, quam eum, in cujus domicilium et ipsa mulier per conditionem matrimonii erat reditura.*"

This means that the treaty as to dowry here considered is not of such a kind that weight is to be laid upon the place

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<sup>9</sup> Cf., too, L. 20. D. 5, 1 ; Paulus, libro lviii. ad Edictum : "*omnem obligationem pro contractu habendam existimandum est, ut ubicunque aliquis obligatus et contrahi videatur,*" where there is no mention of a place of payment.

where it is entered upon; *bona fides* does not require that the husband should have to answer these in actions as to the *dos*. There must then be other contracts in which the place where they originate influences questions as to jurisdiction. If the prevailing view were correct, the cue of the jurist would have been to emphasise the similarity of the contract with which he is dealing to other contracts, instead of holding their differences up to view.

The passages just cited are, with the exception of that from L. 21, D. de O. et. A., taken from the Commentaries on the Edict, a circumstance which seems to me to indicate that all the provisions as to jurisdiction have their origin in prætorian law, which again paid special attention to considerations of *bona fides* and equity.

Lastly, Justinian determines, in Nov. 69, cap. 1, the jurisdiction applicable to contracts, by pointing out that settled as it is it will facilitate the production of proof in *conventiones* and *contractus* just as in the case of delicts. Can we say that proof as to the execution of the contract will be most easily procured at the place of payment, which may be determined by caprice or pure accident?<sup>10, 11</sup>

On the principle of *bona fides* two provisions of Roman law may be easily explained which the prevailing theories can only describe as singular exceptions:—1st, the rule that unless a testator had given special instructions for payment of a legacy at some other place, no action to compel payment of it could be brought, except where the greater part of the succession was situated;<sup>12</sup> 2nd, the rule that, besides the jurisdiction which was founded at the domicile of the deceased and at the domicile of the *fideicommissarius* himself, there should be no other jurisdiction at the domicile of the beneficiary.<sup>13</sup> With regard specially to the former

<sup>10</sup> The *forum domicilii* itself must in my opinion rest upon a decree of the magistrate; the proper jurisdiction according to the *jus civile* would be the *forum originis*.

<sup>11</sup> We need not further discuss in this place the *forum gestæ administrationis*, which is a variety of the *forum contractus*. See above, § 66, note 21, § 87.

<sup>12</sup> L. 50, pr. D. 5, 1.

<sup>13</sup> L. 66, § 4, D. ad Seum. Trib. 36, 1.

rule, in my opinion there is no thought in it of a *fidei commissum hereditatis*, as Savigny supposes, § 370 (Guthrie, p. 212); the will of the testator as to the place where the delivery should take place would have no application to a *fidei commissum hereditatis* which can be restored by a simple declaration on the part of the person burdened with the trust;<sup>14</sup> the will of the testator is far more likely to have been expressed with regard to a *fidei commissum* of some particular articles. In the case of a *fidei commissum* it depends upon the instructions of the deceased where the heir is bound to answer to suits, provided always (by Roman law) that he possesses property, or is personally present in the proposed jurisdiction. Failing express directions, which as a rule will consist in appointing a place of payment, the heir is only bound to pay where it is most convenient for him to do so—*i.e.*, where the largest part of the succession happens to be.

I have thought it my duty to protract this discussion to some length, because I was anxious to exhibit in the principles of Roman law as to the *forum contractus* the same rule which, according to my theory, determines the local law of obligations. If I have succeeded, then I have given an indirect confirmation to the propositions already deduced in my discussion of the law of obligations.

Let us now consider the question whether by the law of the present day the *forum contractus* requires the personal presence of the defender, or the possession of some property by him.

Here the first passage that falls to be considered is from the canon law, which apparently, but only apparently, is at variance with this requirement:—

Cap. 1, § 3, in VIto 2, 2 (*de foro compet.*)—

“*Contrahentes vero aliarum dioecesium, super contractibus initis in Rhemensi dioccesi ab eisdem (nisi inveniantur ibidem) trahere coram se debent invitos: licet in possessionem bonorum, quæ ibi habent, etiam quum alibi copiam sui faciant, si eorum auctoritate citati comparere contemnant, possint missionem facere in eos; vel (si forte malitiose se*

<sup>14</sup> L. 37 pr. D. 36, 1.

*ipsos occultent, ne citatio perveniat ad eosdem) decernere faciendam in possessionem bonorum quæ in alia etiam dioecesi habere noscuntur: sed tunc loci dioecesanus ad denuntiationem ipsorum faciat hujus modi missionem."*

It is said here that upon the requisition of the court in whose jurisdiction the contract was concluded, the judge in whose jurisdiction the goods of the debtor happen to be, shall give *missio in bona*, in order to force the debtor to answer in action. But a necessary condition is that the debtor actually is resident in the jurisdiction of the court where the process is depending, and prevents the execution of the citation by treacherously concealing himself. The matter is then considered as if the citation had been handed to the debtor within that jurisdiction, the competency of the court established, and thereafter the assistance, due by the court to which the requisition is addressed, demanded. It would be a contradiction to hold that the conclusion of the passage speaks of debtors who are not to be found within the jurisdiction of the court, since the beginning of the passage clearly sets forth that debtors who are not themselves within the jurisdiction of the court, and who do not possess property there, cannot be compelled to appear in any action against their will.

The last decree of the diet of the Empire set the fiction of *litis contestatio* in the place of the *missio in bona* in cases where the defender will not give obedience to the citation. It seems as if the effect of that were to set aside the necessity of personal presence, or the possession of property within the jurisdiction of the court, which the older process in cases of contumacy required as its condition. But we must understand that the truth is quite the reverse, in so far as the *forum contractus* really rests on the principles of *bona fides*. Would it accord with these principles if the creditor should allow the debtor with his whole estate to slip out of the jurisdiction of the court in order to raise his action subsequently before a court where the defender would find it much more difficult to maintain his case?<sup>15</sup> I believe not, and am

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<sup>15</sup> The Draft II. for the States of the German Bund provides (cf. § 13 of Draft I.): "The jurisdiction of the obligation is in the sense of the statute

all the more persuaded that it is not so, since a widely spread usage has, in spite of the law of the Empire I have cited, retained that essential condition of jurisdiction.

On the other hand, I am of opinion that these conditions are no longer required in the case of obligations *ex delicto*; there can be no question of *bona fides* here, and any measure to protect the injured party seems justifiable.

But, lastly, there is one case in which I recognise that the *forum contractus* is always constituted at the place of payment which has been stipulated—viz., if the debtor in a liquid document of debt (especially such as a bill), has undertaken to pay at a particular place. We must, in such a case, take the view that in default of payment the liquid document of debt gives the creditor instant right to exact his debt by process, and by process, therefore, at the place of payment: this is favoured by the analogy of the Roman law, according to which the *stricti juris obligatio* could at first be enforced only at the place of payment, and must always be enforced there in the first instance. One must take care, however, not to confuse a liquid document of debt, in which the debtor knowingly submits himself to a *parata executio*, with any written evidence that may be produced.<sup>16</sup> The jurisdiction in challenges arising *ex lege diffamari* and *ex lege si contendat*,<sup>17</sup> given to the court which would have jurisdiction in the principal claim to which the challenges refer (and,

set up in the courts of the place where the defender has to perform his obligation, if—

“1st. The parties have expressly fixed on this place, in which sense the choice of a domicile to carry out a contract is to be construed; or

“2nd. Failing any such express appointment, the citation by which the process is introduced, or the order of the judge, is served upon the defender within the territory of the court.”

<sup>16</sup> The expression in bills of exchange, “payable in any place where I am found,” signifies, according to several decisions of the Supreme Courts of Germany (cf. Borchardt. Wechseldordn. pp. 277-78) that the drawer will be subject to the law and the courts that regulate bills in any country in which he is after the bill falls due. Perhaps, too, the passages of the Pandekts, in which special weight is laid upon the place of payment, are to be understood of *stricti juris obligationes*; whereas L. 19, D. 5, 1, makes no mention of these.

<sup>17</sup> See Bayer, p. 211; Bayer, Theory of Summary Process, 6th edit. §§ 52 *et seq.*

therefore, as a rule, in personal actions the court of the debtor's domicile), seems, however, to contradict the principles we have laid down ; and, as a matter of fact, it has been contended<sup>18</sup> that there should be no jurisdiction in such matters at the domicile of the challenger, but only at that of the challenged, according to the principles of international law, by which, as a general rule, the domicile of the defender settles the jurisdiction, and especially that it is at variance with the principles of the *jus gentium* that any foreigner should be constrained to bring an action. But all that the challenger can effect is to release himself from an obligation ; he cannot, as in other suits, establish an independent right against his adversary. It is, however, the courts competent to the principal claim which determine whether the challenger is to be released. We find, too, in accordance with this, that there is recognised, and cannot but be recognised in international intercourse the jurisdiction of the *forum rei sitæ* in challenges against undefined adversaries, and in edictal citations which happen to relate to real rights in heritable estate. An indirect compulsitor to appear in an action, which lies merely in the risk of losing a right, affords no contradiction of the principles of international law : there is a compulsitor of this kind involved in the law of prescription.<sup>19</sup>

We have already shown that jurisdiction by arrestments is not at variance with international law ; and if we put out of sight the more or less problematical shapes of the so-called *forum connexitatis materialis* and the *forum continentiae causarum*<sup>20</sup>—the former of which, perhaps, arises only in the

<sup>18</sup> Foelix i. § 189, p. 391.

<sup>19</sup> It is a consequence of the doctrine that the *lex domicilii* of the creditor is able to lay special obligations upon him, that international law is forced to recognise a jurisdiction that may exist at the domicile of the party challenged, in terms of the law of that place, so far at least as the principal action is personal. Cf. § 16 of the Draft Code II. for the States of the Bund : "In actions of challenge (*ex lege diffamari* and *ex lege si contendat*) we must recognise the jurisdiction whose competency to the legal settlement of the principal claim is established by this law, and also the jurisdiction of the domicile of the person challenged."

<sup>20</sup> Cf. Bayer, p. 207, p. 228.

application of other jurisdictions ;<sup>21</sup> the latter, however, as it cannot exist without a common court of appeal from the other different tribunals that are competent, has no application to the courts of different countries—there only remains the *forum reconventionis*, which certainly cannot be deduced from any of the principles above demonstrated, and, in my view, can make no claim to international recognition.<sup>22</sup> This principle of jurisdiction rests on grounds of expediency,—which are, however, where the subjects of the different actions are unconnected, of a very doubtful nature—and reverses the competency of the courts, while it cannot be rested upon any voluntary subjection of the pursuer and defender, such as must plainly be recognised in international law. Principle requires the pursuer to follow out his rights in the courts of the defender's domicile, or of the place where the thing in dispute is ; and to that we cannot attach the condition that the defender shall be able to follow out his rights before a court which the principles of international law declare to be incompetent. The conditions of the privilege vary, of course, within one and the same country, in the territory of one and the same legislature.

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<sup>21</sup> Cf. Wetzell, § 41, pp. 359-60. The action which a solicitor has for payment of his *honorarium*, and which the parties have against the solicitor for delivery of the papers in the case in the court where the principal action depends, is, in my view, a case of the *forum contractus*. The necessity for a party who desires to intervene appearing in the court of the principal suit, cannot afford any ground for setting up a special jurisdiction, for it is obvious that one who wishes to take part in a suit must do so in the court in which that action is proceeding. If, lastly, at common law damages for injury done by a criminal act can be claimed by the person injured at the seat of the criminal court *adhærendo*, it is to be remembered that if we cannot regard the *forum deprehensionis* as applicable in international criminal law—although in the early relations of German States to each other, at the time of the Empire, this might have been practicable—the *judex domicilii* or *loci delicti commissi* will decide the claim for damages.

<sup>22</sup> Of course, where the claims are connected, reasons of expediency might recommend an alteration in the common law of nations or the terms of treaties. See § 14 of the Draft II. of the Code for the Bund

## Note X, on §§ 119, 120.

[By the Civil Processordnung, which has regulated jurisdiction in the whole German Empire since 1st October, 1879, the general rule is, that the *forum* is determined by the domicile of the defender (§ 12), unless there is some other exclusive jurisdiction in which it must be brought. In cases where the defender has no domicile within the empire, the fact of residence for a substantial period will establish jurisdiction (§ 18), but only if, in addition to the fact of residence, there has been personal service. If a German has no known residence within the empire, an action may be brought against him at his last domicile. Real rights are determined by the *lex rei sitæ*, as are also personal claims founded upon security rights and actions of damages connected with real estate (§ 25). Questions of status are determined solely by the courts of the domicile; and in questions of succession, the place of the opening of the succession—i.e., the last domicile of the deceased—will be the proper *forum* for certain actions (§ 28). By § 594, procedure for determining the insanity or prodigality of a German who has gone abroad, and restraining him in the enjoyment or disposition of his property, may be taken at the courts of his last domicile. The nationality or domicile of the pursuer of an action is immaterial if jurisdiction be established by some recognised means; and as a foreigner is entitled to sue in German courts, so, too, he is entitled to ask them to impose arrestments upon property, moveable or immoveable, which is in Germany, in order to secure funds for execution of a judgment which is yet to be pronounced abroad. Jurisdiction to try the merits of a claim is not founded in the general case by arrestments specially used for that purpose; but in patrimonial actions, where the defender has no domicile in Germany, jurisdiction is obtained by the following provisions in the 24th section:—"In actions for patrimonial claims against any person who has no domicile in Germany, that court in whose territory there is property belonging to him, or where the particular article sued for is situated, has jurisdiction. In petitory actions the domicile of the debtor is held to be the seat of his property; and also, if any articles



have been attached in security of the claim which is to be enforced in the action, the place where these articles actually are is held to be their seat." This power will operate in the same way as an arrestment to found jurisdiction in the case of foreigners, or even of Germans domiciled abroad, and it will be noticed that the jurisdiction so established is not limited to the value of the property in the territory. But the burden of showing that the defender has property there lies on the pursuer (Trib. of the Empire, Dresden, 25th Jan. 1881). It is not competent to do personal diligence against any foreigner so as to compel him to bring into the empire property that may be thus attached in security of claims made upon him ; but in extreme cases such personal arrest may be employed to prevent a foreigner from withdrawing his property out of the jurisdiction (§ 798). By § 29, the place of the fulfilment of an obligation is held to supply the true *forum* for the obligation, and is set up as an alternative for the *forum* of the debtor's domicile.

In France, as we have seen, the courts are in theory closed, and the remedies of law denied to foreigners, although to this rule there are numerous exceptions. The same principle on which such a rule is justified—viz., that French courts exist for the benefit of Frenchmen—is carried a little further, and it is laid down that all French citizens are entitled to demand justice from their own courts. It has been remarked by an Italian judge (App. Court of Milan, 22nd September, 1879, *in causa Mazzotti v. Cisi*) that "even French authors and French magistrates recognise that this jurisdiction is too grasping and is contrary to common law. It constitutes a privilege at variance with all rules of justice, because it tends to take away the subjects of a country from their own tribunals." Thus Frenchmen are allowed to sue foreigners without any residence in France, and upon obligations whose *forum* is in some foreign country. *Multo magis* is it true that French law will recognise residence without Government authority as sufficient to allow a suit to be brought against one so resident by a Frenchman. This latter proposition has been laid down in a case where there was a "domicile in fact," but no Government license to reside (*Howlett v. Lethbridge*, Trib. Civ. de la Seine, 18th March, 1880). The same

was held in a case where the pursuer was a foreigner and the defender was resident in French territory (C. de Pondicherry, 27th August, 1864). So, too, where obligations are contracted between a foreigner so resident and French subjects, the courts of France will adjudicate upon them, even with the result of affecting real property abroad (Tannongi v. Tannongi, C. de Cass, 16th January, 1867; and Cour d'Aix, 31st January, 1876). The fact of residence as a ground for the exercise of jurisdiction was also sustained in Dubost v. Boracio, 20th March, 1879, by the Court of Lyons.

The French courts will exercise jurisdiction to regulate obligations arising from quasi-delicts (Chemin de Fer de Lyon v. Rontin, Code Cass. 1875), and will recognise the exercise of such a jurisdiction by a foreign court (Trib. de Comm. de Havre, 9th October, 1874).

It is the state of fact at the time of the action, and not at the date of the origin of the obligation, that will determine the jurisdiction, although the court thus empowered to exercise jurisdiction may be entitled to administer the law of another country (Tannongi v. Tannongi, C. d'Aix, 31st Jan. 1876).

The use of arrestments in France will not found jurisdiction to entertain the merits of the dispute between the parties, but they may be used by a court that is incompetent to the merits of that dispute so as to maintain the *status quo* (Cornelli v. Cornelli, 6th March, 1880, Trib. Civ de la Seine), just as the Court will place an estate under judicial administration in France for preservation when parties are disputing as to the property of it in foreign courts (Gandzornoff v. Lehiantz, 5th April, 1877, Trib. Comm. de Marseilles). So, too, in a case where the heirs and the creditors of a deceased foreigner were in litigation for the right to certain life-insurances, the insurance company being French and being nominally a defender in the action for the sake of obtaining a discharge, the French courts would not exercise jurisdiction but upheld arrestments used upon the dependence of the suit till the competent foreign court should determine the rights of parties (Héritiers Philippe, Trib. Civ. de la Seine, 10th April, 1880). Again, where an English

ship had been arrested in a French port by foreign creditors, and along with the ship the freight in the hands of a French subject, the court satisfied itself that the title of the arrester was *prima facie* valid, and sustained the arrestment to an extent sufficient to cover the claims made upon the owners of the ship and freight (Smith & Cie, Trib. Comm. de Marseilles, 13th Feb. 1880). In neither of these cases had any action been raised in the foreign courts at the date when the validity of the arrestments was assailed in the French courts. On the other hand, where a sum was arrested in France, and competing claims were made upon it by French and foreign creditors, the courts of France will determine the rights of these claimants, the only alternative being to remit them to a foreign court, which would be no more competent than the French court (D'Arzac, Caprera & Cie v. Georgiades, Trib. Civ. de la Seine, 12th May, 1877).

In Egypt and in Italy, personal citation in the territory will found jurisdiction against foreigners even on account of contracts concluded abroad.

In Belgium, a defender is competently cited before a Belgian court if he is domiciled or resident there, or if the action arises out of a contract that has originated, or is to be performed there. Like the French courts, those of Belgium will grant warrant to arrest property belonging to a foreigner at the instance of a foreigner to await the issue of a suit raised, or to be raised thereafter, in a foreign court. It is held to be *juris gentium* that the courts of one nation should assist those of another in preserving the relative position of foreigners and their existing rights of property during the dependence of an action, or prevent any unexpected or fraudulent dealing on the eve of an action in which the property in question is to be staked (Trib. Civ. de Gand, 6th April, 1870 ; same court, 27th Dec. 1870 ; Cour de Bruxelles, 18th July, 1871 ; Trib. Civ. d'Anvers, 25th Nov. 1871).

In Scotland, the two leading grounds for jurisdiction are (1) personal presence of the defender within the territory, and (2) the presence of property belonging to him within the territory, either real property, or moveables fixed in their *situs* by arrestment. The most common kind of jurisdiction, *ratione domicilii*, needs no further illustration or explana-

tion, except that it may be noted that the conception of domicile does not demand any Government license ; it is constituted by the fact of residence combined with the intention of residing for an indefinite period ; this is the only ground upon which jurisdiction to determine questions of status can be founded, except in cases where the conception of a matrimonial domicile is by some authorities allowed to establish a special kind of jurisdiction ; residence in Scotland for a period of forty days prior to the action also gives jurisdiction in all actions arising on contracts, delicts, or quasi-delicts, and in questions of bankruptcy ; in certain cases, too, the court will exercise jurisdiction over persons who have been there for as short a time as can be figured, if personal service of the summons be made upon them ; this class of cases consists of actions for aliment of a child, for restitution of moveables seized or hired in Scotland, and for the payment of goods recently bought for ready money. "In actions on contract, whether for implement or damages, it is enough that the place of implement was in Scotland, although the place of contract was out of Scotland" (Mackay, Practice of Court of Session, i. p. 169). In such cases upon contract, there must, however, be personal service within the territory. An itinerant—*e.g.*, a hawker or pedlar—may be convened in any court within whose jurisdiction he can be found (*Lind v. Casadinos*, 24th June, 1881, 8, R. 849). A debtor who intends to quit Scotland in order to avoid the service of an action may be detained upon a warrant issued against him by any magistrate as being *in meditatione fugæ*, until he find caution *de judicio sisti* : this remedy may be adopted although both creditor and debtor are foreigners, but the ground on which the threatened action is to proceed must be either a liquid debt or a specific claim.

The possession of heritable or real estate in Scotland places the proprietor thereof under the jurisdiction of the Scots courts, even although he is not personally cited or domiciled there, and although the cause of action is totally unconnected with that property. Where moveables are fixed in Scotland—*e.g.*, by being *in manibus curiæ*, as the fund in a process of multiplepoinding is, or by being laid under arrestment—then the claimants in the former case, or the owner of the fund

or property in the latter case, are subjected to the jurisdiction of the court ; this arrestment of moveables founds jurisdiction in the Scots courts in actions arising upon contract, and the judgment that may be obtained in an action so founded is not limited to the amount or value of that which is arrested. The courts of Scotland, also, proceeding on the same principle as is enunciated in the Belgian decisions quoted above, have allowed an action to proceed before them so as to secure the execution of diligence used on the dependence, although the real issue raised in the Scottish action was avowedly not intended to be tried in Scotland, but was already in dependence before the English courts ; the pursuer was allowed the benefit of his diligence although it was used on the dependence of an action which would not of itself have been competent (*Hawkins v. Wedderburn*, 9th March, 1842, 4, D. 924, and *Fordyce v. Bridges*, 2nd June, 1842, 4, D. 1334).

“ I repeat, I think the dependence of the suit in England of itself gives us full and complete jurisdiction, the defender having property in this country, if there is any end material to justice between these parties, which the entertaining the suit in this country can promote and serve. I think the furtherance of the interests—the securing of the interests involved in that action, can be stated and founded on in this country as an existing civil right, to be protected, promoted, and secured in the administration of justice in this country. . . . I consider the competency of Scotch process in aid, as it is called, of a Chancery suit, or, as I express it, to secure the ultimate rights and the ultimate payment of a party who has a depending action in Chancery, and finds the whole property, it may be, of his adversary in Scotland, to be a matter of clear, plain, and broad justice in the administration of law in regard to a person who has landed property here ” (per Hope, L. J. C., in *Fordyce*, cited *supra*). The diligences of inhibition and arrestment—*i. e.*, diligence over both heritage and moveables in Scotland—were used and were sustained in these actions.

In England, the leading ground for the foundation of jurisdiction is personal service within the territory of the court, but in actions where the property or possession of real estate in a foreign country is in question, personal service is not held

sufficient to confer jurisdiction on English courts ; in actions against a company, service may be made at their principal place of business within the territory,—in actions to recover land by posting a copy of the writ conspicuously on the property, and in Admiralty actions *in rem* by affixing the original writ, and subsequently a copy, upon the mainmast of the vessel. Service out of the jurisdiction or territory may be allowed in the case of any defender in the discretion of the judge when the subject matter of the action is land, stock, or other property, situate within the jurisdiction, or any act, deed, or will, affecting such land, stock, or property ; or, again, it may be allowed when it is sought to enforce or rescind or otherwise affect any contract, or to demand damages or relief for breach of any contract, which was made within the jurisdiction, or when there has been within the jurisdiction a breach of a contract, wherever it may have been made, or when any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction. In the case of a foreigner, the court will order notice of the writ and not the writ itself to be served. The sweeping nature of the jurisdiction thus claimed by the English courts has been exercised in such a way as to create grave hardships to Scots defenders, and will either be restrained by statute, or amended by requiring a more careful examination of affidavits and consideration of the rights of defenders by those who have the jurisdiction under their administration.

The English Court of Admiralty exercises in actions of damages for collision, and in actions for salvage, its jurisdiction, and enforces payment of its decrees without regard to the place where the collision or other act giving rise to the action took place, if it took place on the high seas where the tide ebbs and flows, and without regard to the fact that one or both of the ships concerned are foreigners, unless they are ships of a foreign State used for public purposes. Foreign sailors, too, belonging to a foreign ship, may recover wages due to them while the ship is lying in a British port. This kind of jurisdiction takes its rise partly in the old maritime jurisdiction of the court, and as regards the competency of actions for damages is confirmed by 3 & 4 Vict. c. 65, § 6,

and 24 Vict. c. 10, § 7: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." But in order to enforce this jurisdiction against a foreign ship by proceedings *in rem*, the ship must be arrested within British territory, and a collision on the high seas is not an act done within the jurisdiction in respect of which the court can order service abroad upon a defender. Where it is proposed to exercise jurisdiction either *in personam* or *in rem* against a foreign owner of a foreign ship, the dependence of the suit must be intimated to the consul of the nation to which the ship belongs. It is, however, doubtful if a foreign court would allow execution of a decree *in personam*, pronounced after intimation of this kind, and proceeding upon so comprehensive a ground of jurisdiction; the action *in rem* where the ship is arrested, proceeds upon principles generally recognised, but it may be noted that (Re Smith, 1876, L. R. 1 P. D. 300), this arrest of a ship is the only form of founding jurisdiction by the attachment of property belonging to the defender which is admitted in England, if we except the attachment used in the city of London, and some other local jurisdictions.

There is also known in English practice a writ *ne exeat regno*, a process whereby a defendant may be prevented from leaving England. "The king indeed, by his royal prerogative, may issue his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign ports without license; for this may be necessary for the public service, and safeguard of the Commonwealth" (Stephen's Comm. bk. i. p. 147). See this applied in the case of a defendant who was a domiciled Canadian (Lees v. Patterson, L. R. 7 Ch. D. 866).

#### PROROGATED JURISDICTION.

### § 121.

In my opinion, it is indisputable that a tribunal may competently be created by an express voluntary submission of parties, which must be recognised in international relations in all cases where the parties have free power to deal with

the legal relations that are involved. (As to the opposite case, see § 92, and the Draft II. §§ 20-2 *infra*, note 2.)

The principles which regulate the validity of contracts in modern times allow that submission to be made by a previous agreement settling the competency of the foreign court, as well as by one in the course of the process.<sup>1</sup> Of course, however, if a foreign court is made exclusively competent by the terms of the agreement, the agreement as against the pursuer can only be enforced in the court which would otherwise have jurisdiction, if it is understood that the foreign court will decide the case, and that the whole convention shall be held null, as being *contra bonos mores*, if it can be shown to be merely a fraudulent means of throwing difficulties in the pursuer's way.

A prorogation not limited to particular legal questions would, on the principles of both public and private law, in my opinion, deserve to be disregarded, both as being an attempt by a party to withdraw himself from the judicial power of the State to which he belongs, and by reason of the indefiniteness of the interest involved in such a bargain.<sup>2</sup>

<sup>1</sup> See Savigny, § 369 ; Guthrie, pp. 196-97, note ; and Bayer, p. 235, as to the passages of Roman law, L. 18. D. 2, 1, and L. 29, *C. de pactis*, 2, 3.

<sup>2</sup> The treaties collected by Krug in Germany almost all provide that—

“No subject is allowed to subject himself by a voluntary prorogation to the jurisdiction of another State, to which he does not belong as a subject and citizen.”

See, on the other hand, the principle of the Draft I. p. 59, where mention is made of the doubt whether these provisions are not to be confined to that general prorogation condemned in the text. The 20th article of the Draft II. runs thus :—

“The jurisdiction of domicile established in one German State (§ 3) cannot, by a voluntary submission (prorogation), be transferred to the courts of another State in its full compass.

“Except in this case, an express or implied subjection to the courts of another country is to be recognised in so far as a prorogation to the court of the other State, if it were a native court, would be admitted by the law of the State in which the defender has his regular domicile.

“A prorogation to the courts of another State is, however, not to be recognised—

“First, if the suit has for its subject a question of *status*, or the constitution, existence, or dissolution of the marriage of one of the parties.



There seems to be some doubt as to the competency of prorogation in real actions (and the *actiones in rem scriptæ*,

“Second, if the exclusive jurisdiction over heritage, referred to in § 19, abs. 2, is proposed to be transferred by prorogation to the courts of another State.

“It is not to be held as a tacit prorogation if the defender pays no heed to the citation that introduces the process, and allows a sentence to go out against him in absence *in contumacem*.”

The § 19, abs. 2, runs thus :—

“In so far as the actions described in § 8 and § 9 have to do with immoveables, the jurisdiction of the domicile is the only competent jurisdiction in addition to that where the property is situated ; and the *forum domicilii* is only competent if it is within the boundaries of the same State.”

§ 8 proceeds thus :—

“The courts of the place where the thing is are alone to be held competent in all real actions, including actions of division and for all possessional suits and personal actions which may be directed against the owner of a thing in that character (*actiones in rem scriptæ*).”

§ 9 says :—

“The forum of succession is to be recognised—

“First, in all suits which deal with the order of succession, the advancement of claims to legacies, or other privileges consequent upon the decease or the division of the succession.”

[By the law of Scotland, the essentials for prorogation are, that the parties should consent, either expressly or tacitly, and that the judge should have such jurisdiction as may be a proper or habile subject of prorogation. There can be no prorogation where some other court, or the court of some other country, has an exclusive jurisdiction (Erskine, i. 2, 27 *et seq*). In a case decided in Switzerland (L. P. et Cie. de Lyon v. E. N. de Genève. Trib. Fédér, 2nd July, 1875), it was held that in a purely personal action a Swiss might prorogate the jurisdiction of the French courts, and could not afterwards resist the execution of their judgment in Switzerland by pleading no jurisdiction. It is there laid down that in questions of succession, bankruptcy, status, and questions relating to immoveables there cannot be any prorogation. It was debated, but not determined, whether a general and indefinite prorogation was competent.

In Germany, by §§ 38, 39, 40 of the Civil Processordnung of 1876, it is declared competent for parties to prorogate jurisdiction except where there are questions of status involved, or where any other exclusive jurisdiction exists.

In England, where the plaintiff selects a foreign tribunal, he is bound by its decision (Westlake, § 386, p. 388) ; and if the defendant voluntarily appears, he too is bound. It is a question whether he will be bound if he comes forward, not voluntarily, but to plead in the foreign court in order to save some property in the hands of that court (Westlake, § 308, p. 308).]

which are on the same footing) which concern heritage.<sup>3</sup> I am inclined, however, to pronounce in favour of the prorogation,—so far, at least, as concerns those States in which real rights in heritage cannot be referred to feudal principles. The opposite view is at variance with the free rights of parties to dispose of their property, and is in a legal sense only to be derived from the assumption of a right of superiority over particular pieces of heritage existing in the State or its sovereign. This point of view, which no doubt applies to the English *Common Law*, does not, for instance, accord with the common law of Germany or the law of France. Nor does it seem to me that considerations of expediency go far to support the exclusion of prorogation by force of positive legislative enactment. The parties have themselves to blame if they go before a judge who deals with them unrighteously; and the protection which the refusal of the power of prorogation may perhaps be thought to give against imprudence—a desirable object—is, in my opinion, more than counterbalanced by other disadvantages which result from such a prohibition. Rights of third parties and the interests of the State can only be imperilled by prorogation in so far as a suit conducted capriciously in accordance with the *lex rei sitæ* prejudices third parties or the State. And lastly, the judgment, according to the nature of the thing, is only effectual in so far as it confers rights to the real property which are possible according to *lex rei sitæ*.<sup>4</sup> Especially in disputes as to succession, which, in accordance with Roman law, require, as being disputes about a universal succession, an uniform settlement and treatment, to exclude prorogation for real estate situated abroad would easily lead to complications.

The facts of each case must determine whether a prorogation can be implied. The pursuer always submits himself to the court in which he brings his suit, and that without

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<sup>3</sup> The provision of the Draft Code for the States of the Bund rests upon this. See the explanation of the Draft I. p. 60.

<sup>4</sup> *E.g.*, separate property in a pertinent of an estate that cannot be divided is by the *lex rei sitæ* impossible. The foreign judge who has acquired jurisdiction by prorogation gives such a right to one of the litigants. Here the effect of the judgment is to produce a legal impossibility, and is to that extent null by the law of the judge himself.

any regard to the reasons which have induced him to choose that court.<sup>5</sup> If, at the time of raising the action abroad, it was not advisable or advantageous, having regard to the possibility of execution, to raise it at home, that does not prevent the renunciation of the native *forum* from being quite voluntary, and that is the only question that needs to be answered ; we may also remember that it is quite unusual in law to take account of the motives for an act, and that to do so must create in practice the greatest difficulties.

But if the defender omits to take objection to the incompetency of the court, we have still nothing more than a tacit submission, if the law under which the court sits would have required it to pronounce for its incompetency if the question had been raised ; and no prorogation can be deduced from the fact that the defender has not appeared, and has allowed sentence to go out against him as *in contumacia*, because, upon the principles of international law, no State has the power of forcing a defender to appear, if he is not subject to its authority in the matter in question.<sup>6</sup>

### THE PLEA OF *Lis alibi pendens*.

## § 122.

The pursuer who raises an action in a foreign court thereby renounces the jurisdiction which there may be in the courts of his own country,<sup>1</sup> and at the same time gives the defender

<sup>5</sup> Massé, No. 200 ; Gand, No. 280 ; Demangeat, on Félix, i. p. 375, propose that the plea of *lis alibi pendens*, founded upon the dependence of an action abroad, should only be sustained if the defender at the time the first action was raised possessed estate in France. On the other hand, see Félix, i. p. 374.

<sup>6</sup> See *supra*, § 118, note 11, and § 20 *ad fin.* of Draft II. (*supra*, note 2).

[When one French ship was run down by another in the Bristol Channel, and an action of damages was tried in England, the French courts refused, on an application by the defender, to order repayment, being of opinion (1) that the English courts were competent, and (2) that objection should have been taken at the time (Trib. Comm. de Havre, 9th October, 1874).]

<sup>1</sup> See the foregoing paragraph.

right to plead *lis alibi pendens* in an action in any other court.<sup>2</sup>

No objection can be taken to the validity of this plea on the score that foreign judgments cannot be executed in a country unless the officials of the country invest them with some supplementary authority.<sup>3</sup> The execution of diligence rests upon a commission given to the officers of the executive, which can only be issued by the authorities of their own country, while the exclusion of all concurrent jurisdictions merely implies an arrangement by the parties as to their private rights.

The further objection which is urged, that until final judgment the recognition of a foreign court can only be held to be an act of capricious choice, which may be recalled at pleasure,<sup>4</sup> is at variance with the true character of a process, which, in so far as the competency of the court can be generally recognised, binds the parties from the very first as a quasi-contract to recognise the validity of the judgment that shall be pronounced after the regular course of procedure.

Finally, as it is no right conferred by public law upon the court that furnishes the ground on which this plea rests, it is a mistake to urge as against the recognition of the foreign court's jurisdiction, that it is not necessary to pay any heed to the priority secured by it.<sup>5</sup>

It need not be shown in detail what confusion would inevitably arise, if the same party could be compelled to answer simultaneously in the courts of several States as to the same matter.

<sup>2</sup> For the recognition of the dependence of an action before a foreign court, see Martens, § 94; Klüber, § 59; Feuerbach, Themis, p. 318 (Draft of a State Treaty, § 21); Fœlix, i. §§ 181-82, pp. 366 *et seq.*, and modern French practice. See, too, the Draft II. § 26. We assume always that the action deals with a legal relation which is dependent upon the free disposal of the parties, or that the foreign tribunal is competent even without prorogation according to the principles of international law.

<sup>3</sup> See, on the other hand, Fœlix, i. § 182, pp. 369-70.

<sup>4</sup> So K. S. Zacharia, in Crome & Jaup's *Germanien*, vol. ii. p. 244 (Giessen, 1809).

<sup>5</sup> Haas, *De effectu*, §§ 14 *et seq.*

*Note Y, on § 122.*

[The expediency of recognising the fact of the dependence of a suit between the same parties as to the same subject matter in a foreign court, and staying proceedings in one or the other, is not uniformly admitted, and has not been long established even in England. In the case of *Cox v. Mitchell*, in 1859, 7 C. B., N. S. 55, where an action was raised in England for damages for breach of contract, and it was objected that another suit was depending in the courts of the United States as to the same matter between the same parties, Erle, C. J., said : "There would be great danger in interfering to prevent a man from being sued in this country, when he may have left his own for the very purpose of evading the consequences of a suit against him there." Crowder, J., said he saw no good reasons for granting the motion for staying the action, but many against it ; while Byles, J., said he had never heard of such an application.

The rule now seems to be that the balance of convenience shall determine the question of staying proceedings in England. Proceedings were stayed in the case of the *Catterina Chiazzari*, 1876, L. R. 1, P. Div. 368, a case of damages for collision in the Irish Channel, the competing jurisdiction being the Irish ; and in the case of the *Mali Ivo*, 1869, L. R., 2 A. and E. 356. In this case, which was an action for damages in respect of a collision at sea, the parties were, one a Norwegian, the other an Austrian ; the scene of the collision was the Bosphorus. The jurisdiction of the High Court of Admiralty is held to exist all the world over where the tide ebbs and flows ; but it was observed that the peculiarity of the jurisdiction invoked would weigh with the judge in staying proceedings, if it were shown that there was truly another suit as to same matter depending in another court, which had power to give the aggrieved party redress. For other cases in the English courts, see Westlake, p. 317, § 319.

The Scottish rule is stated by Lord Neaves in the case of *Cochrane v. Paul*, Dec. 2, 1857, 20 D. 178, thus :—"There seems no incompetency in a creditor bringing several suits against his debtor in several countries for the same debt, if

there is jurisdiction in all, though there is always an equitable power and duty of control in each tribunal to see that there is not on the whole an improper and oppressive accumulation of litigation or diligence." In the case of *Young v. Barclay*, 27th May, 1846, 8 D, 774, where the pursuers of an action raised in the Scots courts for declarator that a person had had at his death a Canadian domicile, and that the pursuers were entitled to his succession, proceeded upon this action being defended to take steps in Canada for uplifting the estate there, the Scottish courts interdicted them from following out these proceedings in Canada during the dependence of the suit in Scotland: this the Court had power to do, all of the pursuers being domiciled in Scotland.

The decisions in France have varied. There are three decisions in 1877, one on the 20th June, the other two both on the 25th July. In the first, pronounced by the Civil Tribunal at Dreux in the case of *Shaffauser v. Waddington*, it was held that a foreign suit will not interrupt French proceedings. The same decision was pronounced in one of the other cases by the Cour de Paris in the case of *Vanderzee*, but in the remaining case of the same date doubts were expressed, and it was thought that probably it was settled that in certain circumstances the plea of *lis alibi pendens* might be sustained, even although the dependence was in a foreign court. How far the French doctrine as to the necessity of reviewing judgments of foreign courts upon their merits before according recognition to them may influence the course of decision in France on this point is not clear.

We have cited various cases touching upon the same point in the notes as to bankruptcy and succession.

It may be interesting to notice shortly the plea of *forum non conveniens*, a plea well known in the practice of the Scots courts. The import of this plea is that although jurisdiction exists in Scotland, the court should not exercise it if they are satisfied that some other court can more conveniently settle the points at issue, although no action may as yet have been taken in any other court. This plea has been sustained in cases belonging to two classes, says Inglis, J. C. in *Clements v. Macaulay* (16th March, 1866; 4 M.P. 592-93)—viz., cases in which executors have been called to account,

and in cases arising out of the terms of copartneries. The court has regard to the interest of the parties generally. But this rule must not be stretched so as to interfere with the maxim by which the judge, who is competent to decide a case, must give the suitor the justice he asks, *Judex tenetur impartiri judicium suum*.

The competency of using arrestments in one country in connection with actions depending or about to be raised in another, is discussed elsewhere, see pp. 536-37, 539.

#### IV. MEANS BY WHICH THE JUDICIAL SENTENCE IS ATTAINED, AND GROUNDS ON WHICH IT IS DETERMINED—(PROOF —*Onus Probandi*—PRESUMPTIONS).

### § 123.

The *lex fori*, as we have already shown, determines the manner in which the facts and circumstances which serve to establish and to support the opposing claims of parties must be laid before the court.

The grounds which determine the judicial sentence are of a two-fold character. In the first place we have to deal with the legal consequences of the alleged facts, and in the second place with the proof of them. The former belong to the region of material private law, but the latter—*i.e.*, the force of the evidence adduced, and the question as to what facts must be held as established until sufficient proof is brought against them (Presumptions and *Onus Probandi*), belongs to the law of procedure, and is dependent solely upon the system of law which regulates the tribunal before which the case depends.<sup>1</sup>

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<sup>1</sup> See *supra*, § 26, and P. Voet, x. § 8; Bouhier, chap. 21, Nos. 205-06; Hert, iv. 67; Hommel, Rhaps. ii. obs. 409, No. 10; Reinhardt, Ergänzungen zu Glück's Pandekten, i. 1, pp. 32-3; Mittermaier, im Archiv. f. d. Civil Praxis, 13, pp. 300-16; Gunther, p. 743-44; Kori, iii. p. 12; Linde, Lehrbuch des Civil Proc. § 41, note 6; Walter, D. Privatr. § 44; Oppenheim, p. 377; Schöffner, p. 205; Unger, p. 209, note 193; Burge, i. p. 24; Wheaton, § 94, p. 125; Story, § 635e; Judgment of Supreme Court of Appeal at Wiesbaden, 20th May, 1851 (Seuffert, xi. pp. 451-52); of the Supreme Court at Berlin, 3rd May,

But, according to the view of many authors, the competency of a particular mode of proof—*e.g.*, the question whether a legal transaction can be proved by witnesses or by documentary evidence alone, is to be determined, not by the law of the place where the court is situated, but by that of the place where the transaction was concluded, since these are questions about *litis decisoria* and not about *litis ordinatoria*.<sup>2</sup> This view rests upon a false extension of a principle which is in itself sound. It is, for instance, no uncommon thing, as we have already noticed, for rules of law which have to do with material private rights to be clothed with the form of rules of procedure (cf. *supra*, § 116, note 2). This is the case when a law prescribes that a particular legal transaction shall only be susceptible of proof by written evidence or some public certificate, or a large number of witnesses, or by witnesses with some special qualification, or by a document furnished with a statutory stamp, whereas as a general rule other means of proof are admissible. The meaning of such an enactment is : a legal transaction of the kind in question which is not established by the necessary documents, or by the witnesses required, shall not be capable of being founded on in an action, or urged as a plea in defence in any other way than by being admitted by the opposite party, or unless there shall be a fiction of such admission under certain conditions.<sup>3</sup> The incomplete invalidity of the transaction is in some measure of

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1845 (Decisions, vol. xi. p. 375) ; of the Supreme Court at Stuttgart, 7th Dec. 1830 (Seuffert, viii. p. 312), 13th June, 1833, and 25th Sept. 1858 (Seuffert, viii. pp. 257-58) ; of the Supreme Court of Appeal at Darmstadt of 11th May, 1856 (Seuffert, xi. p. 302) ; opinion of the Dean of the Faculty of Advocates in Scotland in the Decisions of the Supreme Court at Berlin, vol. xxix. p. 383, note ; Judgment of that Court there quoted.

<sup>2</sup> Bald Ubald, in L. 1, C. de S. Trin. No. 94 ; Molinæus, in L. 1, C. de S. Trin. ; Mascardus, Concl. vi. Nos. 198-99 ; Christianæus, Decis. i. decis. 283, No. 14 ; Boullenois, ii. p. 459 ; Pardessus, No. 1490 ; Massé, No. 274 ; Fœlix, i. § 233, p. 452 ; Heffter, § 39, iii.

<sup>3</sup> If, in spite of the omission of the form, a reference to oath is admissible as by the provisions of the Code Civil, arts. 1341 and 1358, the defender, if he refuses to take the oath, is bound by the judgment, because of a fiction that he has admitted the debt ; if he refers it, he is also bound, because he has admitted it, subject to the oath of the pursuer. To a different effect, too, judgments of the Supreme Court at Stuttgart, 25th Sept. 1858, and 11th June, 1833 (Seuffert, xiii. pp. 257-58).



the same kind as in the case of a transaction which will not found an action, but with regard to which no claim for repetition will lie, if in spite of the defective form both parties have acted upon it. It differs, however, from such a case in this respect, that while a transaction which cannot competently found an action may be pleaded in defence, on the other hand, even if it be admitted by the opposite party, it never can have the effect of carrying with it a judgment in favour of the pursuers.

It is plain that in such a case the question is not one as to the weight of evidence in the true sense,—*i.e.*, as to whether the judge is persuaded of the truth of the alleged facts by the materials laid before him,—but is rather one as to the form of the transaction and the consequences that attach to the neglect of that form. This is obvious from the fact that failing an admission by the defender, the pursuer must lose his action, even although far stronger evidence than that which is required should be tendered—*e.g.*, instead of a private manuscript, ten witnesses<sup>4</sup> who with one voice speak to the agreement of the parties.

We must not, however, confuse a limitation of evidence for particular cases such as this with the question whether evidence is sufficient to persuade the judge of the truth of facts that may be in question.

The qualifications of documentary witnesses, and their number, are to be determined by the *lex loci actus* ; unless,

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<sup>4</sup> The provisions of the Code Civil in reference to this subject seem to me to be quite distinct ; for by art. 1348, 4, if the transaction is once embodied in a proper documentary form, but the document is lost by accident, proof in the ordinary form may be adduced. Burge concedes that as an exception the *lex loci contractus* should determine whether written evidence is necessary, and Story, § 636, proposes that testaments should be proved according to the *lex loci actus*, a theory which is explained by the fact that the English law speaks of the proving of a testament, and not of its forms, even when it is dealing with the regulations as to the latter. (This is consistent with the peculiar procedure in ecclesiastical courts as to dispositions *mortis causa*. Cf. Fœlix, i. p. 445, note 3.) The “motif” of the Draft Commercial Code for Würtemberg (p. 766) remarks: “The law of the place where the act was done determines questions as to the competency of proof in any legal transaction. If the foreign law prescribes no writing, then all means of proof known to the law of the procedure must be admitted, but no others, since the law of the procedure is part of public law.”

besides the form which that law requires, it may be competent to observe the form which is prescribed by some other system of law under which the legal transaction falls, or unless it shall be necessary to observe some other form (cf. *supra*, § 36); but it is the law of the court where the process depends that must decide as to the credibility and competency of other witnesses.<sup>5</sup> Roman law presents an analogy: there seven witnesses are required for a private testament; but it is competent (according to the correct view) to prove the testament by means of two.<sup>6</sup>

By the principle of the equality of foreigners and natives in the eye of the law we find that, in so far as the contrary is not expressly enacted, the former are as capable as the latter of being documentary witnesses.<sup>7</sup> (The provisions of the Roman law to a different effect, by which none but a *Civis Romanus* can be a documentary witness, rest upon the inequality of Romans and strangers in the eye of the law at that time).

It is obvious that it follows directly from what has been already said that the *onus probandi* must be settled by the law of the place where the suit depends.<sup>8</sup>

Presumptions, however, which relate solely to special legal relations, imply some regulation of material rights. A presumption of that kind implies substantially a provision that the legal consequences which are appropriated to some other condition of facts are to be attached to the facts presented in this particular case; the result is that the state of facts which really exists is rejected as being inconsistent with those which are necessary to support the legal conclusion. If, for instance, there is, in relation to a claim of succession, a presumption that B survived A, that implies that, as far as regards this claim, the true state of facts—viz., that both died

<sup>5</sup> Fœlix, i. § 235, p. 458, allows the *lex loci actus* to rule generally; and so, too, Demangeat and Pardessus, No. 1490; Massé, No. 275, and Schäffner, pp. 205-06, take the opposite view. As regards the credibility of witnesses, see the opinion of the Dean of the Faculty of Advocates quoted above.

<sup>6</sup> L. 1, § 3, D. 28, 4.

<sup>7</sup> To a different effect, Massé, p. 32; Gand, No. 154, who considers the duty of a documentary witness as a kind of public function.

<sup>8</sup> Judgment of the Supreme Court of Appeal at Lübeck, 30th Dec. 1859 (Seuffert, xiv. p. 245).

simultaneously—must have the legal consequence attached to it which belongs to the case of B's survivance ; this latter condition of facts cannot, *ex hypothesi*, be capable of being shown to be the true state of fact.<sup>9</sup>

Lastly, it is quite competent, in so far as the subject is at the uncontrolled disposal of the parties, for them to agree by anticipation to declare that certain specified kinds of evidence shall be sufficient, or to exclude all evidence except some specified kind to contradict a legal transaction constituted in a particular form.<sup>10</sup> It needs no argument to show that it is not the *lex fori*, but the law to which the contract in itself is subject, which must determine whether this has been done in a valid way or not. Here, too, it is not so much the conviction of the judge that the alleged facts are true that is at issue, as the rights of the parties arising out of the contract, just as when one party in a process agrees to hold some evidence tendered by the other side as adduced, or refuses to admit the competency of some counter proof which has been tendered.

The *lex fori*, again, as a general rule, will determine the value of business books as evidence.<sup>11</sup> If, however, the law

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<sup>9</sup> Fœlix, i. § 237, p. 460, applies the *lex loci contractus* in the case of presumptions which relate to contracts. So, too, judgments of the Supreme Court at Berlin, 26th Sept. 1849 (Dec. vol. xviii. p. 146), and 17th Oct. 1854 (Striethorst, 15, § 123). Both judgments deal with a presumption in horse-dealing existing at the place of contract. In the latter it is said :—"By common law, presumptions are not mere rules of procedure, but imply principles of material law." (f. such presumptions as those of the Code Civil, art. 1402 :—"Tout immeuble est réputé acquêt de communauté, s'il n'est prouvé que l'un des époux en avait la propriété ou possession légale antérieurement au mariage ou qu'il est échu depuis à titre de succession ou donation." Here the mutual rights of the spouses and of the creditor to the property which is in the possession of the spouses are fixed.

<sup>10</sup> Cf. Code Civil, art. 1341. The words, "*il n'est reçu aucune preuve par témoins contre et outre le contenu aux actes*" simply provide, in my view, that in order to abrogate or alter contracts executed in writing or recorded in a register, the same rules shall apply as regulate their execution. Cf. Fœlix, i. § 234, p. 457.

<sup>11</sup> Judgment of the Supreme Court at Berlin, 3rd May, 1845 (Decisions, ii. p. 375); Judgment of the Supreme Court of Appeal at Darnistadt, 13th May, 1856 (Seuffert, xi. 303). [Extracts from business books made and authenticated according to the law of the place where the extract is made will make faith in Russia (*Cluile v. Roubleff*, 13th Jan. 1877, Senate of Moscow).]

under which the contract which these books are adduced to prove stands, gives them greater weight in evidence, the parties must allow the courts of a foreign country to give them the same weight ; and if there is no common law for the contract (*e.g.*, when it is concluded by letter), the law of the domicile of the pursuer or defender, according as this or that may be the more favourable to the defender, takes the place of the *lex loci contractus*.<sup>12</sup> According to the opinions of several writers and the judgments of several courts, the *lex fori* alone determines the weight of business books as evidence<sup>13</sup> ; in the view of others, the *lex loci contractus* will settle it.<sup>14</sup> I believe that by the intermediate view taken above I have made it possible to solve the controversy.

We have already discussed the *exceptio non numeratæ pecuniæ*,<sup>15</sup> the effect of which in international law must also be determined according to the principles of evidence upon matters of contract.

#### DEMANDS FOR INFORMATION ON THE SUBJECT-MATTER OF AN ACTION.

### § 124.

According to a usage among nations, which is universally recognised, the courts of one country will carry out commissions of investigation (*Commissions rogatoires, literæ mutui compassus sive requisitoriales*) for the purpose of informing<sup>1</sup> the courts of another country upon suits depend-

<sup>12</sup> As to the latter case, cf. what is said above on the law of obligations, § 73.

<sup>13</sup> Mittermaier, as last cited ; Schäffner, p. 206 ; Unger, p. 209 ; Walter, § 44 ; judgment of the Supreme Court of Appeal at Wiesbaden, 20th May, 1851 (Seuffert, ii. pp. 451-52) ; Supreme Court of Appeal at Darmstadt, 13th May, 1856 (Seuffert, ii. p. 302).

<sup>14</sup> Jason Mayerus in L. 1, C. de S. Trin. No. 23 ; Massé, No. 272 ; Pardessus, No. 1490 ; Fœlix, i. § 238, p. 46 ; Savigny, § 381 ; Guthrie, p. 322 ; Holzschuher, i. p. 81 ; judgment of the Supreme Court of Appeal at Cassel, 6th Dec. 1826 (Seuffert, i. p. 135, No. 132).

<sup>15</sup> Cf. § 77, note 3.

<sup>1</sup> See *infra*, § 125, as to the demands of foreign courts for power to carry out diligence.

ing there, in so far as the demand for investigation does not encroach upon the sovereignty of the State upon whose courts the demand is made.<sup>2</sup> The duty which Roman law in later times imposed upon its courts to a certain extent, a duty, therefore, which was incumbent upon the officers of one and the same State to assist each other, was extended in the Middle Ages,<sup>3</sup> when all jurisdiction in every different country was referred, in theory, to the same sources—viz., the jurisdiction of the Emperor and the Pope, to the courts of different countries; and, although, except where treaties existed, there was no complete international obligation such as would justify force in the case of a refusal to comply with it, no State, supposing its neighbouring State complied with the obligation, could refuse to fulfil this moral obligation, which was absolutely essential for friendly intercourse.<sup>4</sup>

The judge upon whom the demand is made conducts the procedure which is desired of him in the form which his own law lays down as essential to secure credibility and validity,<sup>5</sup> and the law of procedure in the other country must allow evidence so taken full credence. Witnesses, then, for instance, will not be required to subscribe their depositions, if that is not required by the law of the court which takes the evidence, in order to secure credibility. The court on which the demand is made may, however, at the special

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<sup>2</sup> Mittermaier, *Archiv. für die Civilistische Praxis*, 13, p. 308; Massé, Nos. 281-82; Fœlix, i. § 240, p. 463; Günther, p. 743; J. H. Böehmer, *Jus. Eccl. Prot.* ii. 27, § 56; Heffter, § 39, ii.

<sup>3</sup> Cf., e.g., Bartolus, in L. 15, D. de re jud. 42, § 1, No. 8; Paulus de Castr. ad L. ult. D. de jurisdic. ii. 1.

<sup>4</sup> The point of view from which Wetzell, § 38, note 31, considers the subject—viz., that of mutual interest, is not adequate. Cf. Gensler, *Comm. on Martin's Text-book of Civil Procedure*, i. p. 106.

<sup>5</sup> Mevius, *Decis. iv. decis.* 238; Gaill, i. obs. 54, No. 4; Mittermaier, as cited; Seuffert, *Comm. i.* p. 263; Bouhier, chap. 28, No. 93; Boullenois, i. p. 546; Massé, Nos. 283-84; Pardessus, No. 1489; Oppenheim, p. 378; Schäffner, p. 206; Fœlix, i. § 246 *ad fin.* p. 476; Linde, § 41, note 5; Wetzell, § 39, note 42. The judge who makes the demand for inquiry alone can determine whether the parties shall be admitted to the process, and must make the necessary notes on that point in his demand.

[Evidence taken on oath before a magistrate in Leith was allowed the same weight as evidence before a German court as it would have had in Scotland, Hamburg, 26th October, 1875.]

request of the court which makes the demand, put in force forms which can be observed without doing violence to any absolutely prohibitory laws, or to the views of proper procedure which it may entertain,<sup>6</sup> and without using any undue compulsitor to a person who may be summoned as a witness or without laying any excessive burden upon the court itself, while, of course it must always respect the forms which its own law requires to give validity to testimony.<sup>7</sup>

On the other hand, it is entirely for the court which makes the demand to say what meaning is to be attached to the result of any such inquiry; and that, again, depends upon its own law; it is that court and that law that desire to be informed as to the existence or non-existence of particular facts; although, of course, unless the demand for information shall make some particular request to a different effect, the judge upon whom the demand is made, not knowing foreign law as a rule, and being in no case bound to recognise it, will conduct the process in the way pointed out in his own law.<sup>8</sup>

The obligation of third parties to give evidence, produce legal opinions, or deliver up documents, is to be determined not by the law of their domicile, since foreigners cannot, in such cases, make any appeal to privileges, but by that of their place of residence;<sup>9</sup> the witness need only take the oath which the law of his place of residence prescribes, and can refuse to answer on any point on which that law does not force him to reply. And, unless there be a treaty which lays down a different rule, and is binding upon him as a subject of one of the States in treaty, no witness can be

<sup>6</sup> Cf. *infra*, note 19.

<sup>7</sup> Heffter, as cited.

<sup>8</sup> As regards, for instance, general questions as to the personal circumstances of the witnesses.

[Section 334 of the Civil Processordnung provides that proof which satisfies the requirements of the court in Germany is not open to any objection that might have been urged against it in a foreign court, by whose officials it has been taken.]

<sup>9</sup> P. Voet, X. c. un § 10; J. Voet, in Dig. ii. 13, § 24; Mittermaier, pp. 310-11, proposes that the law of the native country of these persons should rule, but has in view merely the ordinary case that these persons are residing at the seat of their domicile.

compelled to appear before a foreign court to give evidence ; for the obligations of witnesses are to be construed strictly, and a journey to a foreign country cannot be treated in the same way as a journey to another court in this country. An exception, however, may be made to this rule in cases where demands of the kind are made upon courts situated on the frontier, where a journey into the other plainly does not involve any greater difficulty or disadvantage to a witness than a journey to any tribunal of his own country ; but, of course, the witness must be kept perfectly *indemnitas*.<sup>10</sup> But the citation to appear before a foreign court may always be refused if the witness can show that he will be compelled to answer there questions which the laws of his own country would excuse him from answering.<sup>11</sup>

The duty of litigants to give up documents is to be determined by the law of the court where the process depends ; the question here is as to the reciprocal obligations of parties, which are created by the process itself, and, as a rule, involve, if not complied with, a penalty not extending beyond the process—viz., the inference that liability is admitted.

In demands which refer simply to procedure for furnishing information—*e.g.*, hearing of witnesses, or inspection of some place or thing—the judge upon whom the demand is made needs not to inquire into the competency of the court that makes the demand, but merely to satisfy himself that it is within his power to undertake the duty desired of him. The object of asking him to undertake that duty is the ascertainment of the truth, and that can prejudice no one,<sup>12</sup> or imply any invasion of the jurisdiction of his own court,

<sup>10</sup> This is specially important in Germany. As to practice, see Spangenberg, in Linde's *Zeitschrift für Civilr.* iii. p. 427.

<sup>11</sup> Is the right which our own laws give to public officers to decline to give evidence in matters connected with their duties, also to be recognised in the case of the officers of a foreign Government ? In my opinion, according to actual practice in reciprocity, it is, especially as it is no mere indulgence of the Government, but implies an equitable respect for the obligations under which the officer lies.

<sup>12</sup> It may be incompetent by the rules of procedure to take certain proof. This question is for the sole determination of the judge who makes the demand, not for him upon whom it is made. Cf. Wetzell, § 48, ii. 2, and ii. 1 *ad fin.*

provided that he observes the rights of the witnesses to refuse to answer incompetent questions, and provided also that the parties have an interest which the law will recognise to ascertain the truth.

In my view, too, the judge upon whom the demand is made to serve a citation need not inquire into the competency of the court which makes it, where the only penalty upon disobedience to the decree which the court is asked to serve is being put at a disadvantage in the action, and where no direct diligence is intended to be used; for if the citation is disobeyed it can only put the person cited at a disadvantage; no notice is given him that he must and can defend himself, although it is quite competent for the court making the demand to enforce the penalties in the process which are threatened, after such public intimation as advertisement in newspapers—the penalties being such as an assumption that liability is admitted, or an award of expenses. It is also the case that the judge upon whom the demand is made, by taking up the service of the citation, does not in any way oblige himself to carry out the judgment of the foreign court which is to follow.<sup>13</sup>

Of course the judge on whom the demand is made is not competent to give a judgment on the merits of the action (cf. Wetzell, § 38, note 44), and just as little to give one upon the obligations of the parties in matters of procedure, the penalty attaching to which is to be set at a disadvantage in the process; but he may determine the rights and obligations of third persons whom he calls into the process—*e.g.*, the obligations of witnesses who are called, and the fees due to them; while he is not called upon to decide the rights of parties to take exception to a witness.

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<sup>13</sup> Cf. Gesterding, *Ausbeute von Nachforschungen über verschiedene Rechtsmaterien*, ch. ii. p. 325; *Fœlix*, i. § 242, p. 464 (Wetzell, § 38, p. 326, is of a different opinion); Leonhardt, vol. ii., on the 29th section of the Hanoverian Ordinance on Procedure. The service of the citation, in so far as it threatens mere disadvantages in the process, is simply a communication of a proclamation of the court of procedure, and an undertaking to make this proclamation publicly known. The form of citation, but not the length of the *inductiæ*, depends upon the law of the judge who carries out the demand.



Some older jurists<sup>14</sup> maintain that a judge can cause one who belongs to his jurisdiction (*subditum*) to be cited even within the jurisdiction of a foreign court. This cannot, however, be reconciled with the notion which now prevails of territoriality, in so far as any direct compulsion or diligence is contemplated against a person resident abroad or his property situated there;<sup>15</sup> in so far, however, as the question is one as to the authentication of the citation, it is repugnant to the rule recognised in nearly all the States upon the continent of Europe, that officials, and, therefore, messengers, of courts only enjoy *publica fides* in the district which their own Government has assigned to them<sup>16</sup>—a rule which could not be abrogated by any Legislature without the greatest danger, looking to the want of personal knowledge of the officer in any foreign country.

It has been specially a subject of doubt, under what forms the judge who makes the investigation must take the sworn testimony.

It is clear that witnesses and experts can only be required to take the oath in the forms sanctioned by the law of their place of residence; they are not, as a general rule, bound by the law of the place where the suit depends.

To tender an oath of reference is, however, simply to propose that parties should agree, in a way that admits of execution following on the agreement, that if the oath is refused the party should be held confessed, and in that case, no doubt, it may be matter of question whether the defender is bound to be sworn according to the forms of the place where the suit depends, or whether it will be enough to observe the forms in use at the place where he resides. In my view the latter is correct; the essence of an oath is a solemn obliga-

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<sup>14</sup> Mevius, Decisions, ii. 390; Colerus. Process Exec. iii. c. 7.

<sup>15</sup> See *infra*, next page, as to English procedure.

<sup>16</sup> In this way we refute the view of Wetzell, § 38, note 22, that the service of judicial decrees on any party can be validly effected by an officer of court even in a foreign jurisdiction, if the person upon whom it is to be served receives the decree, because the sole question is as to the proof that is required of the service of the document. Gaill, x. 56, c. 3, 4, upon whom Wetzell founds, expresses himself rather indistinctly, and is probably thinking of public citations.

tion laid upon the conscience before a competent tribunal ;<sup>17</sup> everything else is merely a form which is subject to the rule *locus regit actum*.<sup>18</sup> Indeed, if we were to require a man to take an oath at the place where he resides in a form which would seem according to the views held there to imply an inadmissible rejection of the personal credibility of the deponent,—if, *e.g.*, we were to require a caution by some ecclesiastic, a form not in use in that country,—the judge would have to repel any such demand as being an imposture. Still less can there be any idea that the judge who makes the inquiry should allow the oath to be taken under forms which are at variance with the law which he must recognise (see note 18), or which as a matter of fact he cannot apply.<sup>19</sup> If, then, the person referring the case desires that this oath should be expressly given under forms (*e.g.*, an appeal to God and the Testament—a form not recognised in France), which on the principles stated are not inadmissible, the person taking the oath must swear according to these forms if he is to escape the penalties which the court where the suit depends attaches to refusal, and the court conducting the inquiry can make no objection to the proposal.<sup>20</sup>

As Fœlix tells us, the courts of England and North America do not employ these forms of demand for informa-

<sup>17</sup> Cf. Demangeat, on Fœlix, i. p. 482, note *a*. See, also, the judgment there cited of the Court of Cassation at Paris on 3rd March, 1846, and the judgment of the Supreme Court of Appeal at Dresden, 1st October, 1858 (Seuffert xiii. p. 84). The judgments of the Supreme Court of Appeal at Cassel of 22nd December, 1841, and 28th September, 1853 (Heuser, Annalen, 4, pp. 235-36) lay down that the form of an oath which a foreign court is requested by the courts of this country to take is regulated by the law of this country to such an extent that the appeal to God required by that law cannot be omitted. (The question was as to the French form of oath "*Je le jure.*")

<sup>18</sup> The judge conducting the inquiry must always observe the forms required by his own law ; for laws as to oaths rest directly upon grounds of morality.

<sup>19</sup> Cf. the judgment of the Tribunal of the Seine, 29th October, 1829 ; Fœlix, i. p. 480.

<sup>20</sup> The Tribunal of the Seine by an *arrêt* of 9th August, 1833, ordained that a party resident in France might, on the demand of the Court of Appeal at Brussels, take the oath with an invocation of God and the saints ; Fœlix, i. p. 482. See, too, Massé, No. 289, and the judgment of the Supreme Court of Appeal at Jena, 18th May, 1850 (Seuffert, xii. p. 427).

tion;<sup>21</sup> the court grants commission to one or more judges, or even to a private person residing in the foreign country, to collect the necessary information. It is obvious that such a commissioner can never use diligence to compel the attendance of witnesses and experts, although the credit to be attached to the proceedings taking place before him must be determined by the law and the discretion of the court where the suit depends. If the execution of the commission does not transgress regulations of police,<sup>22</sup> the commissioner will be as free as any other private person to examine witnesses and conduct investigations. After what we have said it needs no discussion to show that such demands for inquiry in matters of voluntary jurisdiction are quite permissible, if the court to which the application is made is not forced to regard the proceedings of the other court as an invasion of its own jurisdiction.

#### V. FINAL JUDGMENT<sup>1</sup>; ITS BINDING EFFECT AND THE METHOD OF ITS EXECUTION.<sup>2</sup>

### § 125.

The jurists of the Middle Ages<sup>3</sup> had, even at that date, taken as a subject for discussion the force and the execution of the judgments of the courts of another territory. In conducting that discussion they applied,—without any hesitation, and without having regard to the different conditions of the courts of the Roman Empire, which were the courts of one

<sup>21</sup> I. No. 421.

<sup>22</sup> In Hanover, for instance, where no private person can administer an oath, a commissioner could not do so.

<sup>1</sup> The judgments pronounced in bankruptcy procedure have, in part at least, not the same character as the final judgment in a suit. See below.

<sup>2</sup> In this paragraph, when we speak of foreign judgments or the judgments of foreign courts, it is to be understood that the term does not include the judgments of such judicial bodies as are specially established by our State in any foreign country by virtue of public treaties. The judgments pronounced by a consul of our country in its name abroad are judgments of this country, and must be recognised as such. Demangeat, on Fœlix, ii. p. 40, note.

<sup>3</sup> Baldus Ubald, in L. 1, C. de S. Trin. No. 93; Barthol. de Saliceto, in L. 1, C. de S. Trin. No. 14.

undivided State,—passages of Roman law, whereby judges are bound to support each the other's authority, to the case of the courts of different States ; in this course they were not wholly without some excuse,<sup>4</sup> since, in theory at least, up to the beginning of the second half of the Middle Ages, all jurisdiction was in the last resort traced up either to the Emperor or the Pope, and it was thought to be the duty of the *brachium seculare*, as well as of the judicatories of the Church, to support each other.<sup>5</sup>

But when, as the territorial supremacy of different States was fully developed in later times, these authorities were seen to be inapplicable, the earlier practice which had obtained in the States of the continent of Europe was not without importance. No doubt, it was assumed that in strict law no State could be bound to recognise, still less to carry into execution, the judgments pronounced by the courts of other countries ; but it was said that they were in use so to be recognised and put in execution *ob reciprocam utilitatem et ex comitate*,<sup>6</sup> provided that the court recognising them was competent, and the interests of the country to which it belonged—or, as it was more commonly expressed, the interests of the subjects of that country—were not impaired by the recognition or execution. The older writers, however, do not lay it down quite distinctly when such exceptions would occur.

Many more modern authorities, on the other hand, attempt to derive the recognition of judicial sentences from purely juristic sources, and put out of sight the *comitas* and the mutual benefits. Some rank a process as a contract ; the judgment resting upon this quasi-contract they propose to

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<sup>4</sup> Baldus Ubald, cod. No. 20 ; Barthol. de Saliceto, cod. No. 3.

<sup>5</sup> Cf. Wetzell, § 38, note 31, and the authors and passages from the Canon Law there cited.

<sup>6</sup> P. Voet, de Stat. x. c. 14 ; Huber, § 6 ; J. Voet, de Stat. § 7. When the German Empire existed, the courts of the various territories could, under certain circumstances, be forced to recognise and to assist each other. This compulsitor, resting as it did on the subordination of the sovereigns to the authority of the Empire, has, in the present time, disappeared. Mittermaier, Archiv. für Civil Praxis, vol. xiv. p. 84. Cf. Spangenberg, in Linde's Gertschrift für Civilr. and Process. iii. p. 423 ; Haas, de Effectu. § 12 ; Strippelman, ii. 1, p. 1.

recognise in the same way as a contract concluded in foreign territory.<sup>7</sup>

But, although a process might be regarded as a contract under older Roman law, in which the parties by an obligation bound themselves formally to recognise the judgment, and although, too, the effect of a process once instituted, and of the judgment might even in later Roman law be referred to a quasi-contract, yet this contract owes its origin to a compulsor which the State permits to be used against the defender: it is to the authority of the State that the validity of the process and of the judgment are in the last resource to be referred<sup>8</sup>; and it is plain that, in the procedure of modern times, where, if the defender refuses to appear, he is held by a fiction to have become a party to the suit, the theory of an agreement *ex contractu* can only apply if the parties recognise the jurisdiction of some particular court by a real agreement and no mere fiction.

Others have sought a foundation for the recognition of foreign judgments in the assertion that any other procedure would imply an invasion of the jurisdiction of the foreign State.<sup>9</sup> It may, however, be said, in reply to this, that to refuse to recognise a judgment pronounced abroad does not do away with it, but merely confines its operation to the territory of its own State, and that we can assign no exact limit to the jurisdiction belonging to the different States, since it is not every judgment pronounced in a foreign country that will be unconditionally recognised by another.<sup>10</sup> The

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<sup>7</sup> Klüber, *Europaisches Völkerrecht*, 2nd Ed. § 59, pp. 75-6; Oppenheim, p. 375.

<sup>8</sup> Cf. Fœlix, ii. No. 318.

<sup>9</sup> Vattel, ii. § 350. Cf. too, Puffendorf, *Observat. Juris Univers. i. observ.* 28, § 8 *ad fin.*

<sup>10</sup> The way in which Kamptz (*Beiträge zum Staats- und Völkerrecht*, vol. i. pp. 115-36, Berlin, 1815) tries to find a foundation for the recognition and execution of the judgments of foreign courts is quite peculiar. The grounds he adduces—that the judgment makes a *jus quæsitum*, that it constitutes a formal legal procedure to which the rule *locus regit actum* must apply, and that the parties have subjected themselves to the judgment—rest, however, on a *petitio principii*. K. S. Zacharia (*Crome und Jaup. Germanien*, vol. ii. p. 229) sets up two points of view: 1st, that of private international law, according to which nations stand in their natural relations to each other and

majority of modern authors adhere therefore to the view that *comitas* and the common interest of nations are the grounds of the recognition and of the execution of foreign judgments.<sup>11</sup>

In accordance with the principles set forth already (§ 116) as to the nature of the judicial judgment,—viz., a *lex specialis* ruling some particular legal relation,—I must refer the recognition of foreign judgments pronounced in accordance with foreign law to the same grounds as those upon which we recognise foreign laws themselves. The admissibility of such a recognition rests upon the basis of friendly intercourse; but no State that desires to remain in such intercourse is in a position to exclude the application of foreign laws at its pleasure. Many authorities take a less strict view of this duty of recognising the judgments of foreign courts, a duty arising in their view from *comitas*, and make capricious exceptions to it to the advantage of their own countrymen.<sup>12</sup> French practice<sup>13</sup> does not recognise at

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recognise no overlord; 2nd, the point of view of public international law, according to which the different States are members of an international body under a common law. According to the former, which he describes as being at present the practical point of view, a foreign judgment will not be recognised; it can only be carried out in some exceptional cases on the basis of the principles which regulate agreements and compromises; or the subjects of a State must have had procedure taken against them in a foreign State according to their own law; or the judgment must be a deliverance upon some act that has taken place in the foreign State. According to the second theory, foreign judgments must be recognised unconditionally. See *supra*, § 23, as to the possibility of founding the recognition on the theory of a vested right to be protected in all countries, a theory to which Wetzell attaches himself, § 38, note 30, and Haas, de Effectu, takes as his leading principle.

<sup>11</sup> Massé, No. 298; Martens, § 94; Burge, iii. p. 1050; Wheaton, § 147, p. 195.

<sup>12</sup> Fœlix, ii. p. 66, § 344.

<sup>13</sup> French practice rests upon the 121st article of the Royal Ordinance of 15th June, 1629, and articles 2123, 2128 of the Code Civil: "*L'hypothèque judiciaire résulte des jugements . . . l'hypothèque ne peut . . . résulter des jugements rendus en pays étrangers, qu'autant qu'ils ont été déclarés exécutoires par un tribunal français; sans préjudice des dispositions qui peuvent être dans les lois politiques ou dans les traités;*" likewise in the 546th article of the Code de Procédure: "*Les jugements rendus par les tribunaux étrangers et les actes recus par des officiers étrangers, ne seront susceptibles d'exécution en France, que de la manière et dans les cas prévus par les articles 2123 et 2128 du Code Napoléon.*" Some French authors take the view that these provisions

all the judgments of foreign courts, but admits the proceedings on which the judgment has followed to be received as evidence in any process which may be raised by the party against whom judgment has gone to resist execution;<sup>14</sup> and in Spanish practice the judgment of a foreign court is not entitled to any respect:<sup>15</sup> these are all explained by the neglect, on the one hand, to observe the distinction that exists between recognising the validity of a judgment and carrying it into execution—on the other hand by the fact that the judgment rests directly<sup>16</sup> upon a determination of

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merely prevent the recognition of foreign judgments which are to the prejudice of French subjects, whereas in the case of other judgments to the prejudice of foreigners, the French courts, in order to decide whether it is admissible to put the decree in execution, only require to ask whether the judgment is at variance with the *jus publicum*, and implies an invasion of French sovereignty. By another view, which rules the practice, the person against whom judgment has gone may require a fresh investigation of the whole matter in the French courts.

<sup>14</sup> Fœlix, ii. § 369; Emérigon, *Traité des Assur.* chap. 4, sect. 8, § 2; Pardessus, No. 1488.

<sup>15</sup> Fœlix, § 398. The procedure is the same in Sweden, Norway, and Russia. Fœlix, ii. §§ 400-02.

<sup>16</sup> See specially to this effect a judgment of the Rhine Senate of the Supreme Court at Berlin, 12th October, 1858 (Striethörs, xxx. p. 300, especially p. 311). This judgment refuses to lay any weight upon the fact that the previous judgment pronounced by the foreign court proceeded upon an oath of reference, "as the oath had not in itself the character of a voluntary arrangement, and was all the less entitled as an element in the foreign process to carry any greater weight with it than this process itself, in respect it was only tendered in the end of the day, the judge of this country is of opinion that the documents produced, upon which the case is principally rested, are sufficient to complete the evidence in the case." In this view I cannot concur. The oath of reference is, according to the common law of Germany, in so far at least as the person referring is concerned, quite a voluntary transaction, whatever the position of the other party may be: the transaction does not become involuntary because the person referring would lose his case before the judge of this country if he did not tender the oath to his opponent. If he proposes to assail this judgment subsequently in a foreign court, he need care nothing for the rules of process here. The opposite view tends to expose oaths to a want of respect that is highly dangerous. The mistake of the view that isolated steps of process can never have a greater influence than the process itself, to the effect here in question, can be clearly and precisely demonstrated by a comparison of some modern regulations as to procedure. See, *e.g.*, the *Bürgerliche Processordnung* of 1850 in Hanover, § 444.

an officer of the State, while other rights cannot, as it is argued, be constituted without a reference to the will of the parties.

In the first place, the recognition of the validity of the judgment, and therefore the effect of the *exceptio*, and in the same way the *replicatio rei judicatæ*, are different from execution of the judgment by diligence, in this respect that the latter requires a commission to be given by a magistrate to the officer who is to do diligence, and none but a magistrate of the country where diligence is to be done can give such a commission, and therefore before any judgment of a foreign court can be executed, it requires a declarator from the judge of this country that it may be carried out.<sup>17</sup> The recognition of the import of a judgment has been erroneously supposed to need the same formalities as the execution.<sup>18</sup>

In the second place, the acquisition of all rights is finally dependent upon the will of the supreme magistrate of the State: every right rests upon the law in so far as the law can create or destroy it; the law in its turn rests upon the deliverance of the authority of the State. If, then, the application of foreign laws is permissible, it cannot be a good objection to the recognition of judgments of a foreign court that the question here is as to a deliverance of the supreme authority of the State, which can have no effect in another country.

But now we come to the difficulties which surround the attempt to fix the conditions under which a foreign judgment is to be recognised. For to recognise it unconditionally would in fact be to allow the foreign State an unlimited influence over legal relations in our country, and to give rise to dangers which would be all the greater in respect that the legal systems of many countries stretch their regulations as to the competency of their courts to the prejudice of foreigners. By far the greater number of authors and the practice of most countries in which foreign judgments are recognised at all, require in the first place, at least in so far as the execution of diligence is concerned, reciprocity. The practice of England,

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<sup>17</sup> Cf. Fœlix, ii. §§ 320, 351.

<sup>18</sup> See, on the other hand, Wheaton, § 147, p. 195.



Scotland, and the United States, is the sole exception to the rule.<sup>19</sup>

In my view the non-recognition of foreign judgments is to be justified as a measure of retaliation, and it is therefore the Government, and not the court, that must regulate it. But since no measure of retaliation has any further object than the advantage of its own subjects, it would not fall to be applied if a foreign judgment had found for one of our subjects against the subject of the State in question, and they declare themselves either expressly or by implication content with that, which has become known to them. We shall see that the non-recognition of foreign judgments is calculated to produce the greatest uncertainty in the rights even of the subjects of the State that refuses it, and therefore in my view the retaliation would have to be confined to a denial of the means of doing diligence.

The judgment, then, all are agreed, must be pronounced by a competent court. But what principles will serve to determine the competency of the court ?

According to one view it is sufficient<sup>20</sup> that the judge who pronounces judgment is competent by his own law. But this is simply to place in the hands of the foreign legislator the power of invading<sup>21</sup> each and every legal relation that exists in our land by regulations as to the competency of his own courts. This theory has found but few supporters ; it cannot be reconciled with the independence and unity of different States.

In another view, the court from which the judgment issues must be competent both by its own law and the law of the other State concerned ;<sup>22</sup> for one State cannot refuse to

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<sup>19</sup> Cf. *Fœlix*, ii. § 328. It does not, however, constitute a ground of obligation for our State, if another State carries the judgments of our Courts into execution (*Merlin*, *Rép. Jugement*, § 14). Government may, however, refuse to recognise foreign judgments, if for instance the courts of that other State do not present the necessary guarantees of regular procedure (*infra*, pp. 587 *et seq.*).

<sup>20</sup> *Kori*, *Erörterungen*, iii. p. 12.

<sup>21</sup> See, on the other hand, *Wächter*, i. p. 308, and *Feuerbach*, in his *Themis* or *Contributions to Legislation*, Landshut, 1812, pp. 97-8.

<sup>22</sup> *Feuerbach*, p. 94 ; *Wächter*, ii. p. 418. The Royal Ordinance of Bavaria of 2nd June, 1811, proceeded on the same principles (*Feuerbach*, p. 128).

another what it allows in its own case. It may, however, be asked, whether there are not many rules of jurisdiction which were intended by our lawgiver to apply merely to the relations of the different courts of his own country, and whether we must not refuse to recognise in this country other rules of jurisdiction, which favour the native of the country where they are in use, when they come to be applied in that country to the relations between our countrymen and the natives. To satisfy this theory both of these questions must be answered in the negative; but that has not been shown, and hardly could be shown, to be the true answer.<sup>23</sup>

We have already established the principles that regulate the competency of courts in private international law. It follows necessarily that the judgments of competent courts abroad must be recognised.<sup>24</sup> For to refuse recognition in such a case would simply be to drag before our courts an action which the sense of our law excludes from them, and assigns to the competent court of the foreign country; and there is as little foundation for the objection that a recognition of foreign judgments injures our State, as for the assertion that it would be consistent with the sovereignty of one State that it should refuse unconditionally to apply the law of any foreign State. Besides that there is no need of a special declaration by the magistracy of this country to mark the recognition of the import of the judgment: the whole question in dispute is settled by the court whose decision we recognise, and we cannot at the same time hold the view that it requires a special act of the executive power of the State to give effect to this settlement. We might as well say that while we recognise the acquisition of property by foreigners

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<sup>23</sup> The Drafts for the States of the German Bund start from the assumption that rules as to the competency of the courts of one country are not to be unconditionally carried over and applied to those of another country. They come pretty nearly to the result reached in the text, although they do not proceed on any special moving principle, and are always in correspondence with the special kinds of jurisdiction which are found in Germany.

<sup>24</sup> The sentence of the competent court on the merits of the case is to be recognised for the prestations involved in it, and especially for payment of expenses. The Supreme Court of Appeal at Wiesbaden recognised this (cf. Nahmer, ii. p. 303).

in their own domicile we must require a special *privilegium* for each case of acquisition as it arises.<sup>25</sup>

We may make a special observation as to jurisdiction by arrestment at this point. This kind of jurisdiction is from its very nature limited to the subjects arrested or their money-equivalent, the caution found by the defender upon the arrestment being used. The *exceptio rei judicatæ* pleaded upon the ground of the exercise of such a jurisdiction can only be sustained under that limitation, and execution against the defender can never be demanded from the courts of any other country.<sup>26</sup> It seems, however, to be incompetent to require the subjects or their money-equivalent adjudged to the pursuer in the *forum arresti* from him in any other court. The pursuer has acquired right to the subject itself or its value, as the case may be, in conformity with the *lex rei sitæ*,<sup>27</sup> and that must be recognised in a foreign country, even although the judicial sentence as such cannot be allowed to have effect. We must treat in the same way the case of an arrestment laid not upon any corporeal article, but upon some

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<sup>25</sup> Wheaton, § 147, pp. 194-95, remarks: "*C'est un principe généralement reconnu parmi les nations, que toute sentence définitive prononcée par le tribunal compétent d'un état doit être respectée et tenue comme définitive par les tribunaux d'un état, ou la sentence est invoquée comme exceptio rei judicatæ.*" He would allow the execution of foreign judgments solely upon considerations of mutual profit, and not without conditions. Cf. Martens, Précis. § 94, and Massé, No. 305, who, however, is not at one in this point with the French practice.

<sup>26</sup> The defender may certainly have a judgment finding the pursuer liable in expenses executed in a foreign country, if the pursuer should fail in his action. The pursuer has voluntarily subjected himself to this sentence. Cf. *supra*, § 119, note 9, and the 10th section of the Draft Code II. for the States of the German Bund reported there. [No such limitation is recognised in Scotland to the jurisdiction founded by arrestments, but the Judgments Extension Act does not apply to decrees in absence obtained in Scotland upon such arrestments. See *supra*, § 120, note, p. 539.]

<sup>27</sup> Cf. Story, §§ 549-50, 591-92, and the decisions reported there. Even a judgment by an admiralty court of an enemy in time of war condemning a vessel as a prize will be recognised, if at the time of the condemnation the vessel was in the hands of the enemy. Story, p. 734, § 588 *et seq.*; Fœlix, ii. § 549, are of opinion that this latter principle, which has been adopted in France in spite of their non-recognition of foreign judgments in other matters, is not true to the principles of international law. But both rest upon a recognition of the sovereign rights of that State within whose power the thing in question really is.

outstanding claim of debt : it is obvious, however, that since the arrester can only be regarded as a possible assignee, that court alone which would have to adjudicate upon the claim itself is competent to lay on the arrestment—*i.e.*, as a rule the court of the domicile of the debtor in the obligation which is the subject of the arrestment.<sup>28</sup>

It follows, too, from the same principles, that a party upon whom diligence has been done by execution of a decree of court in one country can never bring an action for recovery of what has been taken from him in another State ; the one must proceed upon the law of the same State as the other.<sup>29</sup> On the other hand, in order to carry out a judgment by diligence, we certainly require a consent, and a license to carry it out to be given by the executive of the State on each occasion ; that is so because the state of circumstances which is to be the result of the judgment is not yet really brought about.<sup>30</sup>

Burgundus even had started a theory which is closely akin to that adopted by us. Just as he divides *statuta* into *realia personalia* and *mixta*, so he sets up three kinds of actions in reference to the subject of the execution and recognition of foreign judgments—*viz.*, *actiones reales*, *personales*, and *mixtæ*. He, too, proceeds from the axiom that the right of legislation and the authority of judicial determinations correspond with each other in international law. But he throws the question into confusion again by giving an *effectus personalis* to a judgment upon real rights pronounced by some other court than the *judex rei sitæ* ; and, on the other hand, by confining the effect of a *sententia*, which imposes some duty of acting or refraining from acting upon a party, primarily to the territory in which it is pronounced, while he proposes that it should not be recognised abroad unless with the concurrence of the judge of the foreign territory,

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<sup>28</sup> Story, § 592a.

<sup>29</sup> Story, as cited.

<sup>30</sup> For this reason, even the production of documents which belong to the category of voluntary jurisdiction will not warrant the execution of diligence in a foreign country without a special declaration to that effect which can be worked out on the spot. Cf. *supra*, note 17, and Fœlix, ii. § 476.

but gives no rules to regulate the giving or the withholding of that concurrence.

Boullenois,<sup>31</sup> who takes the same division as his starting-point, proceeds more correctly. He recognises not merely judgments upon questions of status, which alone are included by Burgundus in the class of *actiones personales*, but also other deliverances, which compel some personal payment or prestation, pronounced *in foro domicilii* of the defender: he maintains, also, that foreign judgments pronounced by any judge other than the *judex rei sitæ* in *actiones reales* (real actions referring to immoveable estate) are ineffectual in a foreign country; but he takes away the foundation of his own theory by laying down the rule that the recognition of foreign judgments affecting real property in this country is at variance with the sovereign rights of the State; this reason, if it were sound, would not only establish what he desires, but would demonstrate that all judgments pronounced in a foreign country are entirely ineffectual, since all legal relations which it is proposed should bear some effect in this country are thereby subjected to the sovereignty of this State as fully as immoveables situated there. At the same time, in his view the *forum contractus* is without further inquiry recognised in its widest range, whereas the judgment pronounced by a foreign court in a case specially submitted to its decision by agreement of parties is not allowed the force of a final decree, but merely admitted to provisional execution, although the reason of this limitation is not made plain. But, lastly, it is not clear how the *forum domicilii* can rule *actiones personales* which did not take their rise there, but are rather subject to another system of law—*e.g.*, that which is recognised at the place of the execution of the contract, or at the seat of a previous domicile. We now proceed to inquire what will be the consequences of a persistent refusal to recognise the judgments of foreign courts.

The parties are then able of new to assert rights and competing rights, and to adduce evidence and counter-evidence; thus, apart from the consideration that the legal theories of different courts seldom exactly coincide, it is probable that

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<sup>31</sup> I. 601.

in many cases the judgments of different courts will arrive at different results. If, then, the court finds at this stage that it was unjust to dismiss the action in the foreign court previously brought, it will give judgment now for the pursuer. But so soon as the defender finds the property or the person of the pursuer within his territory he may demand that that which the second judgment has taken from him shall be restored, on the ground that that second judgment is of no force in his State: in this way matters might possibly go on for a considerable time—this party prevailing at one time and the other at another. It is to be observed that intercourse with foreign countries would thus be made almost impossible, and the disadvantages arising from non-recognition of foreign judgments would certainly affect the subjects of one State as much as those of another in the most vital manner. If, however, we should take the view that the courts of a country where foreign judgments are not recognised are bound in case of doubt to decide in conformity with the decision of the foreign court, the whole subject is dissolved in capricious determinations, or in expensive and dilatory forms.<sup>32</sup>

It is quite possible, according to the view we have adopted, that the judgment of a foreign court may not deserve recognition. This can never be the case where the pursuer has failed, since any pursuer who has recourse to a foreign court voluntarily subjects himself to its decision. The defender only can appeal to the invalidity of a foreign judgment. But since, as a general rule, the jurisdiction which our theory calls upon us to recognise is the place where the defender possesses property, and where he is most easily found, it will seldom happen that any such appeal is made, and the pursuer has himself to blame for the disadvantages that result from the choice of any other court—*e.g.*, if the competency of the courts in the pursuer's country is extended so as to prejudice the interests of foreigners.

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<sup>32</sup> The recognition of the judgment as such excludes investigation into its merits (cf. Spangenberg, Gersterding, p. 313; Burge, iii. pp. 1066-67; Wetzell, p. 338; Fœlix, ii. § 329). Belgian jurisprudence adheres firmly to this principle, and makes an exception only where the judgment is pronounced in France *jure retorsionis*. Cf. Fœlix, ii. §§ 378-81.

The disadvantages we have indicated recommend that even as a measure of retaliation the non-recognition of foreign judgments should not be employed. The refusal to carry them into execution, on the other hand, in so far as it is proposed to do so against residents in the district where the court to which the demand is made is situated, does not involve these disadvantages, and may therefore be employed by way of retaliation.<sup>33</sup> Besides that, it is obvious that leave to carry a judgment into execution must always be refused if the claim itself to which it is sought to give effect must

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<sup>33</sup> See the report of the Commission on the Draft I. p. 23.

Wächter, ii. p. 419, proposes that no judgment should be carried into execution in another country if it is in conflict with any prohibitory laws of that country, whenever, in view of the court which is asked to carry it into execution, the legal question at issue should have been determined in conformity with its own law. In the view we have adopted such a case can never occur, for either the judge is competent, because the legal question at issue must be determined by the law of his own country, or else the parties have voluntarily submitted themselves to his jurisdiction, be that course right or not. If it can be shown that the judgment has been obtained by some means which our law describes as fraudulent, the court is relieved of all obligation to assist the other, for the claim of the pursuer is pronounced by our law to be immoral. Story, §§ 544-45. If the court in which the foreign judgment is pleaded is forced to infer that the procedure adopted abroad never gave the defender an opportunity of defending himself, then the execution of the judgment, and the recognition of the *exceptio rei judicatæ*, must both be refused as being contradictory of the supreme principles of justice, which require that the defender should be heard, or should have an opportunity of being examined. The courts of England and America require that, if the defender had no domicile at the place where the suit depended, or possessed no substantial property there, the first citation should be personally served upon him, and that in every case it should be presumably known to him. Burge, iii. pp. 1056-57; Story, §§ 547-48, 540 *ad fin.* A judgment of the Senate of Sardinia at Nizza, 26th April, 1841, in spite of a treaty between France and Sardinia, by which the execution of judicial decrees could be reciprocally required, refused to allow a decree by default against a Sardinian subject, in the Court of Commerce at Marseilles, to be carried into execution, because there had been merely service upon the *procureur du roi* of the court at Marseilles; and the Sardinian court held that service of that kind was contrary to the fundamental rules for the administration of justice in Sardinia. Fœlix, ii. p. 68, § 344, note 1. The Draft Code for the States of the German Bund provides as to this matter:—"If an action is instituted before a court of one of the German States recognised as competent by the provisions of this law, as to some civil question against a party, the *forum* of whose domicile lies in some other State, the citation which

be regarded by the law of our State as *contra bonos mores*, or generally cannot be carried out in this country.<sup>34</sup>

On the other hand, proof cannot be required to show<sup>35</sup> that there was not enough property affected by the diligence in the foreign country where the judgment was pronounced to satisfy it.<sup>36</sup> Besides the practical difficulties of such an investigation, such a demand is at variance with the rules of procedure in civil actions, by which, in the first place, the judge has no right to determine directly on what property diligence is to be done; and it might also lead to the most inequitable results if, for instance, the foreigner happened to possess real property abroad, which should become subject to diligence *ultimo loco*, but had in this country property which was primarily subject to it.

In one case only must recognition and execution always be refused to a judgment issued abroad—viz., where the judgment is really in a penal action. The court to which application is made for execution can only co-operate in so

initiates the process, or any judicial order upon that party, must either be endorsed by a magistrate of the State in which he has his domicile, in accordance with the law of that State, or must be personally served upon him in the State where the suit depends; but if this provision is complied with, the court of the other State must give effect to the citation or the order. It matters not, in so far as the rules herein laid down are concerned, that the party has answered to the citation or order."

<sup>34</sup> Hessian Ordinance of 25th April, 1826. If, for instance, the tenor of the judgment is that the defender shall make over to the pursuer some real right in an immoveable situated in another country, the law of which does not recognise such a right, or if it finds the defender liable to make over moveable estate to a Jew, while Jews are incapable of possessing real estate according to the law of the country where the estate is, and where execution of the judgment is asked. Cf. Report of the Commission, p. 24. From the grounds given in note 33 it is plain that English lawyers regard a deliverance of a competent court as *prima facie* evidence of the subject to which it refers. (Cf. Story, § 547, and the notes of a judgment of Lord Brougham there cited.) This view is entirely different from that of the French jurisprudence, which only allows the proceeding which led to the first judgment to be adduced as evidence. In English practice the judgments of a competent court are recognised as such. See Story, §§ 603-04.

<sup>35</sup> Feuerbach, p. 121, desires this counter-proof to be allowed.

<sup>36</sup> See, on the other hand, Mittermaier, 14, pp. 105-06; Spangenberg on the Hanoverian Ordinance as to the inferior courts, § 161, which shows the practice in Hanover; Thöl, § 77, note 2.



far as its law declares the judgment to be absolutely just. It is then inevitably necessary that the whole matter should be investigated anew. In the case of an action for damages *ex delicto*<sup>37</sup> (and the court which is to give execution must determine the character of the action by reference to its own law) a fresh investigation is not necessary upon the same ground; but there will always be an indirect way of introducing such an inquiry to some extent if the judgment has not been pronounced *in foro domicilii*, and the defender disputes the fact of the delict, since the proof as to the place where the delict took place cannot be separated from the proof as to whether it really took place at all.

It follows necessarily that the courts of the State in which it is proposed to carry the judgment into execution determine whether the court was competent to pronounce it under the principles of international law. If the decision of this question depends upon disputed matters of fact, a proof of these must be allowed, even although they may already have been the subject of evidence taken before the foreign court.<sup>38</sup> This may, no doubt, lead to the result that, in pursuance of this object, the courts of the State in which the judgment is pleaded will have to enter upon an examination of the grounds of action—if, for instance, the question should be in what place the contract was concluded. According, however, to the theory we have adopted as to the *forum contractus*, such cases can only occur very rarely. The facts upon which questions as to the *forum contractus* depend must, in the vast majority of cases, be undisputed, and the *forum delicti commissi* is in itself of little moment in international intercourse. Admissions which may be made on this point before the first court must be held, even by the court before which the judgment may afterwards be brought, as a voluntary submission to its jurisdiction. The same, too, is true of the tendering of an oath or referring the cause to it, a proceeding

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<sup>37</sup> Recognised in the convention of 6th-19th July, 1855, between Saxony and Baden, art. 23. On the other hand, in the Draft Codes for the States of the German Bund, the *forum delicti* is not recognised. Cf. the "motif" to the 1st and 20th sections of the First Draft, and Draft II. § 34 *ad fin.* "The provisions of this law shall not be applicable to suits for damages."

<sup>38</sup> Cf. Draft I. § 27; and Draft II. § 30.

akin to an agreement.<sup>39</sup> Fictional admissions, however, have no influence upon the court which is to put the judgment in force. They assume the justice of subjecting a party to diligence, which is the very question to be debated in the court to which the subsequent application is made. A result of this is that the absence of the defender can never establish the competency of any court so as to bind a foreign court;<sup>40</sup> while, on the contrary, to enter upon a discussion of the merits of a case without raising the objection of want of jurisdiction, if the law of procedure in the court does not allow a subsequent return to this plea, implies a declaration that the party is prepared to carry through his suit before this tribunal, and therefore a voluntary subjection to its authority.

If it be established that the judgment is the judgment of a foreign court according to law, it matters not to the court which is asked to carry it into execution in what manner it was reached; it is, too, a matter expressly left to the determination of the law and the courts of the country in which the judgment was pronounced, how far the person resisting execution is entitled to be heard judicially and to use remedies of law.<sup>41</sup> (Cf. *supra*, note 33.) One is apt to

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<sup>39</sup> The pursuer always submits himself to the jurisdiction of the foreign courts in so far as the payment of expenses is concerned.

<sup>40</sup> Draft II. § 20 *ad fin*: "It is not to be held a tacit prorogation of jurisdiction that the defender gives no obedience to the citation which introduces the suit, and allows a judgment by default to go out against him."

<sup>41</sup> The treaties reported by Krug, pp. 11-15, contain in almost identical terms in article 3, the addition:—"A judgment pronounced by a competent court in accordance with law, a civil judgment, gives rise to the plea of *res judicata* in the courts of the other country, with the same results as if the judgment had been delivered by a court of the country in which the plea is urged." Savigny, however (§ 373; Guthrie p. 233), properly notes that hardly any attention has been paid to the more delicate distinction started in the text, and that the meaning unquestionably was that the plea when it arises upon a foreign judgment should be as valid as if it had arisen upon a judgment of the courts of this country, and could not therefore be repelled because the first judge held office in another country. In harmony with the principles here developed, the 30th section of the Draft Code provides:—

"The court which is asked to carry a decree into execution must dispose of objections to the execution if they deal with either—

"1st, the conditions on which, according to the rules of law of the court, the execution depends; or,

think that the sentence of a foreign court should have no greater effect than that which is given to the sentence of a native court, and that therefore a judgment pronounced by a foreign court in accordance with law should be open to be assailed or rendered ineffectual in the same way as that of a court of this country.<sup>42</sup> But this is a mistake. The recognition of a decision pronounced by a foreign court rests upon

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“2nd, the mode of execution itself and the procedure that is to be observed.

On the other hand, all objections which do not fall under these two heads must be regulated by the law of the court that pronounced the judgment. The court where execution is demanded is competent to deal with objections to it arising from claims made by third parties to the subjects on which it is proposed to do diligence.”

<sup>42</sup> The Ministerial Ordinance of Prussia, of 24th April, 1833, reported by Mannkopf, i. 24, § 30, recognises this principle, but holds the *induciae* within which execution may proceed as a *modus procedendi*, which is regulated by the law of the court upon which the demand is made. Cf. judgment of the Rhine Court of Cassation at Berlin, in Volkmar, p. 259: “Judgments pronounced in foreign courts can only be declared capable of execution in this country to the same extent as they are capable of execution abroad. The question, too, whether the nullity of a foreign decree may be pleaded *ope exceptionis* or must be established by means of a special action of reduction in the competent court, must, in accordance with the principles already laid down, be settled by the law of the court in which the judgment was given.” A judgment of the Supreme Court of Appeal at Lübeck, of 30th June, 1843 (Senffert, ii. pp. 317-18) upholds the competency of pleading a nullity, *ope exceptionis*, in accordance with the law which is recognised as the seat of the court where the *actio judicati* comes to depend, and not in accordance with the law under which the judgment, as to the competency of executing which the question has arisen, falls. The court notes, as the foundation of this judgment, that by the opposite view, if an action was brought in a German court upon some document executed before a French court, the falsity of that document could not be pleaded simply *ope exceptionis*, but must be urged in the form of a French *inscription en faux*, a point which must in certain cases (Cf. Code de Procédure, arts. 14, 240, 249), be transmitted to a special court in France; no one could maintain such a view. But in my opinion the analogy between the judgment and the document is not complete; the document does not, like the judgment, establish a legal relation—it only proves it. If any law does not permit the plea of nullity to be advanced in another court *ope exceptionis*, it enacts thereby that the judgment with all its effects shall stand until it is formally reduced. If, then, a third court nevertheless proposes to pronounce the judgment invalid, that is irreconcilable with a recognition of the import of the judgment. On the principle adopted as its guide by the court in the judgment cited above, it fell into the dangerous position of being forced to determine a question by foreign laws of procedure.

this, that our law commits the disputed point to the decision of the law of the foreign judge, or upon the fact that parties have of their own free will subjected themselves to that law. In both cases the judgment must be accepted with all the consequences and effects which the foreign judge intended to attach to it.<sup>43</sup> Even although the foreign court invests its decision with the force of law *inter omnes*, whereas our law would restrict its authority to the contending parties, we must recognise the full effect ascribed to it; for the necessary condition of the competency of the judgment to affect third parties is that the courts of the country in which the judgment is pronounced are, upon the fundamental principles of international law, competent to exercise jurisdiction over these third persons.

In the same way the question as to the legal force of the grounds of decision depends upon the law of the court which pronounces the judgment, provided always that the legal relation which is to be affected by the original decision falls under the law and the jurisdiction of the State in which the judgment was pronounced.<sup>44</sup>

Just as a definitive or final determination of any legal relation in our State has a good claim to be recognised and to be carried into execution, so must a provisional or conditional determination be recognised and carried out, the more so as

<sup>43</sup> English courts have decided that they will not recognise judgments pronounced abroad, if the foreign court, while professing to apply the law of England, has misapprehended that law in such a way as by the law of England renders the judgment null, whereas no account is taken of an error which would merely ground an appeal. Burge, iii. 1064-67. [But according to Westlake, § 310, p. 313, this course would no longer be taken by an English court; no account would be taken of any mistake as to English law. "The errors referred to may be more easily ascertainable by the English court than other errors of law or fact, but in their relation to the merits of the case they do not seem to differ from other errors."]

<sup>44</sup> Cf. judgment of the Cour Impériale at Rouen, 23rd May, 1813 (Sirey, xiii. 2, p. 233). The "motif" of Draft I. states that the draft does not propose to answer these questions. But it does indirectly proceed upon the very theory adopted by us, at least in so far as a challenge of the judgment is concerned, for in § 29 (cf. Draft II. § 30), in so far as the application of a foreign judgment is demanded, it refers all pleas which do not touch the competency of the court from which the judgment issued or the method of execution, to the court which has cognisance of the principal action.

the latter frequently passes into the former by mere lapse of time, and as in a strict sense every judgment that is open to be assailed in any way is merely a provisional determination of the legal relation in dispute. The rules as to the execution of foreign judgments are not therefore to be limited to legal judgments in the strict sense, but every judgment which can, by the law of the court that pronounces it, be put into execution, must be capable of being put into execution in another country under the same conditions as if it were a final sentence in a regular process.

This theory, adopted in most of the German treaties,<sup>45</sup> and in the Draft Code for the States of the German Bund (§ 1), and as developed by the "motif" of this draft, is also supported by overwhelming considerations of expediency,<sup>46</sup> especially as it may be that the legal force of a judgment is dependent upon the possibility of carrying it into execution ;<sup>47</sup> in which case, so soon as the defender ceased to possess any subject upon which diligence could be done in the State where judgment was pronounced, the opposite theory would lead to the result that the successful party would altogether lose his undoubted right.

Conversely, the court which had jurisdiction to determine provisionally the legal relation has jurisdiction to reduce this provisional determination, and to regulate finally the legal relation in dispute; and that is an exclusive jurisdiction, for the suit has once come to depend in that court; and the second course of procedure—which may, for instance, be a secondary action in an executory process at common law, dealing with illiquid pleas remitted to a separate probation—is merely a continuation of the former (cf. Draft I. § 6, note, pp. 30-1, and Draft II. § 15).<sup>48</sup>

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<sup>45</sup> Cf. Krug, p. 13.

<sup>46</sup> "Motif" of the Draft I. p. 19, and Draft II. § 1. Otherwise a decree of the Supreme Court of Appeal at Cassel, 27th November, 1841 (Strippelmann, ii. 1, p. 14).

<sup>47</sup> Cf. for instance, art. 146 of the Code de Procédure; art. 643 of the Code de Commerce.

<sup>48</sup> "If in the course of a suit before some court which must be recognised as competent in virtue of this law, in which, by common law, only certain kinds of evidence—*e.g.*, documentary evidence—are admitted, some illiquid pleas should be remitted to a special probation, the courts of the country where the

There can be no general answer given to the question as to the mutual relations of the different provinces of one and the same State in matters of the recognition and competency of executing the judgments pronounced therein. If these different provinces have one common system of jurisdiction or one judicial establishment, that will suffice to render the division into different provinces quite immaterial; the consideration whether the supreme court for the separate provinces does or does not consist of the same persons cannot be held to decide the question any more than it will solve the difficulty to determine whether the judgments proceed in the name of the same sovereign or not;<sup>49</sup> a union under one person, though it might be quite fundamental, or a union which dealt merely with political questions, would not solve such a question as this where rights of private law are concerned. The Draft I.<sup>50</sup> of the Code for the States of the German Bund proceeds with questionable accuracy on the assumption that the provinces in the different States of the Bund have no independent judicial establishment and jurisdiction.<sup>51</sup> The second draft seems, on the contrary, to have abandoned this principle.<sup>52</sup> This general rule, however, must be laid down, that if assistance is to be given to foreign courts independently altogether of special treaties, it cannot be refused to the courts of another province, if there is no question as to their jurisdiction.<sup>53</sup>

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process depends, declared by the law of that country to be competent to such probation, must be recognised as competent to determine questions as to these pleas, in so far as they raise questions as to the withdrawal or recall of the judgment in the former process, or the re-imbursement of money paid upon that decree."

<sup>49</sup> Judgments of English courts will only be recognised in Scotland, and Scottish judgments in England, as if they were judgments of foreign courts. Cf. Burge, i. p. 672, iii. p. 1050; Story, § 54. [But see p. 592, *ad fin.*]

<sup>50</sup> Cf. § 1 and § 3, and the analysis, p. 28.

<sup>51</sup> Cf. *e.g.* Hannov. Pr. O. 8th November, 1850, § 663, 1.

<sup>52</sup> Cf. § 1: "Every judgment pronounced in matters of civil right in a German State which can, by the law of that State, be carried into execution, must be put in force in every other State of Germany just like a judgment pronounced there, in so far as—1st, the court which has given judgment is to be recognised as having jurisdiction according to the provisions of this Code."

<sup>53</sup> The judgment of the Supreme Court at Berlin, of 5th May, 1857, says no more; it is thus expressed: "No doubt, in the general case, judgments of

The separation of the district of the country in which judgment was pronounced, from that in which it is proposed to carry it into execution, has no effect upon the private rights of parties, and therefore none upon the recognition of a judgment. If, however, a judgment pronounced in this country is confirmed by a foreign court of second instance, which has become competent to entertain it by reason of the separation it becomes a judgment of a foreign court. Conversely, the union of two countries has no effect upon judgments capable of being carried into execution which were pronounced before the union.<sup>54</sup> The fact that the judgment was pronounced at a time when the place where the court is situated was temporarily occupied by the enemy does not make it necessary to view the judgment as if it had been pronounced by a foreign court.<sup>55</sup>

The question whether in any particular case a foreign judgment is to be executed, is substantially one of private law,<sup>56</sup> and is, therefore, committed to the determination of the courts of law ; but, on the other hand, the preliminary question whether the judgments of this or that foreign State shall be allowed to be put in execution at all or not, depends on considerations of public law and the relations that subsist

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the courts of Rhenish Prussia must be carried out in the old Prussian provinces. It cannot be understood that the same Government which gives the force of law to the judgments of the courts of Rhenish Prussia intended to give them this force for one province only, and to refuse it in so far as all other divisions of the kingdom are concerned." These judgments, however, which, if affecting inhabitants of old Prussia who had not been personally present in the Rhine provinces, depended entirely upon the 420th article of the Ordinance for Procedure in Rhenish Prussia, had given rise to doubt, because the general Prussian Ordinance, i. 2, § 150, had not duly recognised the *forum contractus*, as the 420th article did, and judgment of that kind by the Rhenish courts appeared to imply an invasion of the jurisdiction of the other provinces (Striethorst, xxiv. p. 264). Since then a special statute has been passed in Prussia on this point.

<sup>54</sup> Cf. Fœlix, ii. § 363, and the French decisions reported there.

<sup>55</sup> Fœlix, ii. § 364, p. 107.

<sup>56</sup> Cf. Judgment of the Supreme Court of Appeal at Cassel, 11th February, 1854 (Heuser, Annalen, i. p. 674). The Draft Code for the States of the Bund refers these questions to the court. By older French jurisprudence, a foreign judgment furnished with the *Pareatis* and the great seal might still be called in question by an inferior judge on the score of jurisdiction, Boullenois, i. p. 645.

between the States, and is, therefore, committed to the decision of the official who represents the justice of the State in its foreign relations—in German States the Minister of Justice. If the successful party desires to institute the *actio judicati* in order to put the foreign judgment in force, the court which has jurisdiction to deal with the sum in question by the law of the land is the competent court for the procedure ; a simple warrant for diligence can, on the other hand, be obtained from any court within whose jurisdiction subjects liable to diligence can be found, and for this purpose the court which has to decide other disputes in the process of doing diligence as to the value of the subjects seized, and the amount of the sum for which diligence is to be done, has jurisdiction. In this case the successful party must show that by the law of the court from which the judgment issued a simple warrant of execution, either from the court itself or from the proper officer, would be enough,<sup>57, 58</sup> and that such a warrant is the proper procedure prescribed by the law of that country, instead of a demand made through the court where the suit depended.<sup>59</sup>

Where it is quite plain that it is not admissible to put the judgment into execution, the court which is invited to pronounce a declarator that it is admissible may, of its own accord, refuse to give assistance.<sup>60</sup> But in the opposite case,

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<sup>57</sup> This is so because the results of the judgment must be generally determined by the law of this court.

<sup>58</sup> On the difference between these cases, see a judgment of the Supreme Court of Appeal at Cassel, 21st Feb. 1854 (Heuser, Annalen, iii. p. 636 *et seq.*), "The *actio judicati* instituted by a foreign pursuer against a defender belonging to this country upon a foreign judgment is truly of a private nature, while a warrant to carry out the decree must, in the first instance, proceed upon the legal force which public law attaches to the judge's deliverance. The result of this distinction is, that the special provisions of the Hessian land laws which depend on considerations of public law, and regulate the demands of foreign officials, are not to be applied in the former case. But still the judge of this country must, where the defender belongs to this country, test the legality of the judgment of the foreign court, in respect to its jurisdiction.

<sup>59</sup> See the procedure adopted in France with reference to judgments pronounced in Switzerland and Sardinia, Fœlix, ii. §§ 372-73.

<sup>60</sup> Cf. Ordinance of Hesse Cassel of 25th April, 1826, § 3, No. 2 ; Proclamation of the Ministry of Nassau, 4th October, 1824 (Nahmer, ii. p. 396).



since there may be some special defence against a foreign judgment, even if execution would pass upon a judgment in this country without any hearing of the opposite party, an opportunity must be given to him of urging any objections that are competent by the regulations for procedure recognised in the court from which execution is asked.<sup>61</sup>

If execution is refused by a subordinate court, an appeal or complaint to a higher court (regard being had to the value of the subjects on which diligence is to be done, as affecting the competency of such a course) will be permitted<sup>62</sup> just in the same way as in other disputes arising in the course of the procedure for diligence.<sup>63</sup>

DELIVERANCES BY ARBITERS — FORMER PRACTICE — COMPARISON  
OF THE VARIOUS GROUNDS OF JURISDICTION TO BE RECOGNISED  
IN INTERNATIONAL INTERCOURSE.

§ 126.

The deliverances of arbiters are to be treated like the sentences of judges, in so far as parties are forced to submit themselves to them; the arbiter to whom the parties are forced to submit themselves takes the place of the regular judge;<sup>1</sup> a voluntary submission, however, is to be regarded like a contract made in a foreign country, even although other judgments by the courts of that country are not in use to

<sup>61</sup> Nahmer, as cited. To a different effect, Hannov. Processordn. § 534.

<sup>62</sup> Nahmer, ii. p. 396. The execution of the judgment is not an affair of caprice, dependent upon the pleasure of the particular court (Gesterding, p. 321).

<sup>63</sup> Of course, in the absence of special provisions which may provide that the minister of justice shall be the judge of last instance.

<sup>1</sup> Fœlix, ii. § 424. Where the parties by a special bargain have subjected themselves to the decision of arbiters, but this cannot proceed without a judgment of the court appointing parties to submit to the judgment of the arbiters, because there has been a dispute as to their appointment; this is in truth a case of an involuntary submission, which resembles a judicial deliverance, and will be so treated. Cf. Hann. Civil Pr. Ordn. § 533. A true decree-arbitral is recognised even in France.

[It is quite competent for a foreigner to act as an arbiter; he is truly a mandatory (*Albertoli v. Gouthier*, 15th March, 1875; Ct. of Chambery).]

be recognised here;<sup>2</sup> the only distinction is, that the courts of the country in which diligence is to be done must always, as a preliminary step, invest the decree-arbitral with their sanction before execution can be done.<sup>3</sup> Even the deliverance of a permanent court of arbitration established by the State is to be regarded as a settlement of matters in dispute by way of contract, if both parties have voluntarily subjected themselves to it; but, in respect of the requirements of a true contract, it is not sufficient to produce this effect that the merits of the question at issue have been discussed before the arbiters.

The very first principles of German practice admit the recognition of judgments pronounced in another country, and the execution of them, so long as reciprocity is observed;<sup>4</sup> all that is required is, that they be judgments of courts of competent jurisdiction. There seems, however, to be a lack of generally recognised principles to determine under what conditions foreign courts are to be considered as having competent jurisdiction. Sometimes it is held sufficient if the court which pronounces the judgment was competent under its own law;<sup>5</sup> sometimes it is thought necessary that it should be competent according to the law of this country also.<sup>6</sup>

More recent treaties have abandoned this endeavour, and have sought on entirely different principles to introduce a method of regulating such questions which is fairly in accord with the principles we have adopted.

The practice of the courts of England, Scotland, and America is, upon the whole, in conformity with these

<sup>2</sup> Fœlix, ii. § 425; Massé, Nos. 319, 322.

<sup>3</sup> Fœlix, ii. § 427.

<sup>4</sup> Wetzell, § 31.

<sup>5</sup> Cf. Püttlingen, p. 155.

<sup>6</sup> Cf. for instance, the judgments of the Supreme Court at Stuttgart, 5th September, 1854 (Seuffert, viii. p. 448); of the Supreme Court of Appeal at Lübeck, 27th December, 1852 (Römer, i. p. 337). Ordinance of Hesse, 25th April, 1826. So, too, the practice in Denmark, according to Fœlix, ii. § 345, p. 69. Many laws do no more than lay down the necessity of competent jurisdiction, without determining how this is to be settled. Cf. *e.g.* Braunschweigische Verfassungsurkunde of 12th October, 1832, § 310; Law of Würtemberg, 25th April, 1825. [See *infra*, p. 587.]

principles. The recognition and application of the judgment are not made to depend upon the reciprocity of the other State. The competency of the *judea rei sitæ* is, however, held to be exclusive, so that there cannot even be a voluntary prorogation of this to another court in accord with international law, and it is apparently impossible to make the judgment effectual in a foreign country.<sup>7</sup> There is, then, no recognition of a special *forum contractus*; but this distinction is rendered quite immaterial<sup>8</sup> by the extension of the *forum domicilii*, and the consequent subjection, after a residence of some duration, of the person to the jurisdiction of the place where he resides,—at least in questions of obligation, and so far as the property there situated is concerned.<sup>9</sup> Since their courts hold fast to the view that a sentence which can be described as a gross injustice by the law of their country can never be made the foundation of a claim to be followed out there,<sup>10</sup> it is always, and particularly in questions as to the execution of diligence, required that the defender had, or must be presumed to have had,<sup>11</sup> knowledge of the action, and that the pursuer must not have conducted his action in a way that can be described by the law of England as fraudulent, or at variance with the principles of *bona fides*.<sup>12</sup> Isolated cases have no doubt occurred in which a wider license has been allowed in testing foreign judgments.<sup>13</sup>

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<sup>7</sup> Story, §§ 543, 551, 591.

<sup>8</sup> Story, § 543.

<sup>9</sup> Cf. Story, §§ 587 *et seq.*, especially §§ 606-08; Burge, iii. p. 1050; Wheaton, § 147, pp. 194 *et seq.*; Fœlix, ii. No. 40.

<sup>10</sup> Story, § 544 *ad fin.*

<sup>11</sup> See last paragraph, notes 19-20.

<sup>12</sup> Another exception is made if the foreign judgment is built upon the law of this country, but has apprehended it incorrectly, so that by the law of this country the judgment is a nullity; but not where the result would merely be to give right of appeal (Burge, iii. p. 1064-66).

[This is thought by Westlake to be no longer a rule of English law, § 310, p. 313. See *supra*, p. 578, note 43.]

<sup>13</sup> See Story, § 602, against the illogical view that a judgment of a foreign court may serve to destroy, but can never establish a right. In the United States it is provided by the constitution that in every State full faith shall be accorded to any judgment or judicial procedure had in any other State of the Union. This is, however, no obstacle to trying the question of competent jurisdiction as affecting the recognition of the judgment.

No general rules can be laid down upon the question whether diplomatic interference is necessary in cases where a demand for inquiry is made upon foreign courts.<sup>14</sup>

The results of this discussion are in brief :—

The judgments pronounced by a foreign court of competent jurisdiction are to be recognised to the effect of founding the *exceptio rei judicatæ*, or, as the case may be, the *replicatio rei judicatæ*, irrespective of whether the foreign State in question will give reciprocity, under the condition always that there has been a true suit, and that the procedure can not in any way be described by the law of this country as fraudulent.

In the sense of international law, and for its purposes, jurisdiction belongs—

1st. To the courts of the country where the defender is domiciled, in all personal actions, and all real actions that deal with moveables, in so far as the *forum rei sitæ* is not, under the third head following, competent.

2nd. To the courts of the State by the laws of which a contract obligation must be determined, in so far as the debtor is personally present there, or possesses substantial property there, in all actions springing out of that *obligatio*.<sup>15</sup>

3rd. To the courts of the State in which a delict was committed in all actions for damages, but not for penalties, arising out of that delict.

4th. To the courts of the State in which property or claims of debt are laid under arrestment, to the amount of the value of that property or these claims,<sup>16</sup> in issues relating to the principal claim for the security of which the arrestments have been used.

5th. To the courts of the State where the property in dispute is situated, in all real actions that touch real property or moveables, which are permanently attached to the spot by dedication.

<sup>14</sup> Cf. e.g. Püttlingen, §§ 122-23.

<sup>15</sup> And in all actions, too, for reduction of the obligation, as is plain from the principles laid down above, in the law of obligations. See, too, the Draft II. for the States of the German Bund, § 6 *ad fin.*

<sup>16</sup> Of course in so far only as the State where the arrestment took place recognises the competency of establishing by this means a *forum arresti* which may regulate the real claims of parties.

6th. To the court of the State to which parties have voluntarily submitted themselves.

The execution of foreign judgments depends further upon the consideration that the outcome of the judgment shall not be directed to any object which is by our law held inadmissible or immoral, and all execution may be interdicted by Government if the foreign State in question refuses to carry out judgments pronounced by courts of our country having jurisdiction upon the principles above laid down, in so far as the judgment in question is in favour of some person not belonging to our State.

*Note Z, on §§ 125, 126.*

[The principles of jurisdiction in various countries, in so far as they differ from those stated in the text, have been considered already (cf. *supra*, § 120, note, p. 534 *et seq.*). It remains to consider here shortly the principles which will be taken to regulate the recognition and the execution of judgments pronounced in the courts of another country.

In Germany, the rule formerly was that the validity of the judgment of a foreign court was recognised, and execution was allowed in Germany on condition of reciprocity (*Matty v. Friedrich*, Court of Giessen, 3rd July, 1876). By §§ 660-61 of the Civil Processordnung, foreign judgments are now recognised in the Empire, and execution is given by the authority of a German magistrate, unless—(1) The judgment has not become final and capable of being put into execution in its own country; (2) The recognition or execution would violate some public law of the Empire; (3) The foreign judge, according to principles recognised in Germany, was incompetent; (4) The debtor is a German and has not been cited, either personally in the foreign territory, or in German form in German territory; (5) The courts of the foreign country in question do not show reciprocity.

In Belgium, similarly, the court which is asked to give execution to a foreign judgment will satisfy itself—(1) That the judgment is not contrary to public order, or the fundamental principles of Belgian law; (2) that it is a final judgment in its own country; (3) that an authentic extract is produced; (4) that the rights of the defender have been

respected—*e.g.* by due citation ; (5) that the jurisdiction of the foreign court has not been sustained solely by reason of the nationality of the pursuer. Code de Procédure, art. 10, 25th March, 1876. The last proviso seems intended to meet the jurisdiction exercised by the courts of France, in virtue of the 14th article of the Code Napoléon, in favour of any French suitor who appeals to them against a foreign defender. The Belgian courts had held, before the date of the Code just cited, that where parties had agreed to refer all questions arising upon a certain contract to the law of a foreign country, any judgment following upon that agreement did not require to be revised by the Belgian courts before being put into execution (Trib. Civ. de Bruxelles, 5th April, 1873). Foreign judgments in compliance with the conditions cited above do not now require revision.

In Italy, the judgment of a foreign court will be recognised, and will be put in force, if the foreign tribunal was competent by its own law, and if the defender was duly cited, and, if a minor, properly represented ; the question of whether the citation and representation were regular and adequate will be determined according to the law of the court which has pronounced the judgment ; but a decree in absence, for example, is not a judgment of which execution can be demanded ; it is held to be “destitute of all legal foundation” (Demarri *v.* Bosso, Court of Cass. at Turin, 25th August, 1874). The regularity of other points of procedure will be determined by the *lex fori* (Mazzotti *v.* Cisi, App. Court of Milan, 22nd September, 1879). By treaties concluded in 1760, and 11th September, 1860, between Italy and France, the only inquiry that can be had into a judgment of either of these countries which it is sought to execute in the other, is whether the court had jurisdiction under its own law, and the procedure has been regular ; the execution of the judgment must not transgress public order, or encroach upon the constitution of the country in which it is to be enforced ; the merits of the judgment will not be examined. In spite, however, of the provisions of these treaties, a judgment of a French court founded on the principle that its own subjects are always entitled to appeal to it for protection, and in flagrant disregard of the rule *actor sequitur forum rei*, will

not be allowed execution in Italy, as being contrary to the first principles of international law (Ct. of App. at Catania, 22nd March, 1879, *Ardizoni v. Rider*). The Italian courts require an authentic extract of a foreign judgment before allowing it to be put into execution (*Freyberg v. Benasatti*, Court of Appeal at Venice, 24th May, 1874); and where there is a concurrent jurisdiction in Italy and some foreign country, a judgment obtained in the foreign court will be stayed in execution in Italy until the Italian court has come to a determination of the question (*Morand v. Debenedetti*, App. Court of Turin, 12th March, 1875).

In Denmark, there is no distinct legislation on the subject, but the best authorities lay it down as law that there will be no examination of the judgment, and that the only points for inquiry are—(1) Whether the judgment is by its own law final, and one on which diligence would be competent in its own country; (2) That the right established by the judgment does not run counter to any fundamental rule of Danish law; and (3) That the foreign court had jurisdiction under the rules of international law as they are understood in Denmark.

The rule in France has been thus laid down by the Court at Nancy: "According to principles of jurisprudence now uniformly recognised, and in accordance with the rules that must be observed for the protection of the sovereignty and independence of different States, decisions of the courts of one country cannot be carried out in another unless a power is reserved in favour of the courts of the country where execution is sought to examine the merits of these decisions." Like the other systems we have noted, the French law demands that the foreign judgment shall be regular, and shall not be founded upon any doctrine that is repugnant to sound principle (C. de Paris, 24th November, 1873); and will not enforce an English judgment which is no longer available as a ground for diligence in the country where it was pronounced (*Brown v. Massy*, C. de Paris, 17th August, 1877); but, in accordance with the rule laid down by the Court of Nancy,—a rule which depends for its validity on an ordinance of 1629,—they will examine the merits of all foreign judgments of which execution is demanded, unless there shall be, as is the case with Italy, some treaty to a contrary effect;

a foreign judgment was reviewed entirely anew (Trib. Civ. de Pondicherry, 21st October, 1872); even a Scotch decree of confirmation is subject to the rule (*Veuve Wright v. L'Etat*, C. de Rennes, 26th November, 1873); and the same principle was followed in the case of a Spanish judgment (*Roche et Welker v. Pradines*, 15th January, 1878, Trib. Civ. de la Seine). But the foreign judgment does not go for nothing; in an action where a foreign court had given one French subject damages, on account of a delict committed by a fellow-subject, the French courts affirmed the foreign judgment and allowed interest to run at foreign rates (*Raymond v. Messier*, 9th June, 1880, C. de Cass.); and a French court refused to allow a Frenchman, against whom an English firm of solicitors had obtained decree for costs in the English court, to plead in France that the solicitors had neglected their duty, that plea not having been taken in the original action (*Renshaw et Rolph v. Maître*, 24th March, 1877, Trib. Civ. de la Seine). The rule of jurisdiction that excludes two foreigners from settling their litigations in French courts is not applied as regards the execution of judgments already pronounced by a foreign court; the French courts have allowed execution to proceed on a judgment in a suit brought by an Englishman in England against an Austrian (*Panmure & Co. v. Werner*, 1st August, 1879, Trib. Civ. de la Seine). Where execution of a foreign judgment is required, application should be made directly to a court in France of the same grade as that which has given the judgment, and no appeal should be allowed (C. de Nancy, 6th July, 1871).

The law of Scotland requires that action should be raised there for execution of the foreign judgment, and the principle on which such actions are determined is thus stated by Lord Jeffrey in a judgment in which a decree pronounced by an American court was founded on for execution in Scotland. His Lordship found "that the judgment libelled of the Court of Chancery of the State of New York, being a foreign decree, is not of the same authority as a final decree of the courts of this country, and can only be considered as affording *prima facie* evidence of the truth and justice of the claims of the pursuers, but is liable to be impugned on



the part of the defenders—not merely by proof of want of jurisdiction in the court from which it issued, or of its having been pronounced in the absence of the defender, or of material irregularities and informalities in the course of the proceedings—but also by proof of its having proceeded on error of fact, or even on error of law, more especially when the law applicable to the case was not the proper law of the country where the suit was tried and determined” (*Southgate v. Montgomerie*, 9th Feb. 1837, 15 S. 507). In the case of *Whitehead v. Thompson* (20th March, 1861, 23 D. 773) this case was referred to with approval, and it was laid down that a foreign judgment is examinable on grounds, clearly and relevantly stated, going to impeach its validity and its justice. The principle is stated, too, by Erskine, iv. 3, 4, and the only qualification it has received from modern authority is, that the case is not to be retried, but that it is competent to order distinct allegations assailing either the procedure of the foreign court, or the law or facts on which its judgment is based, to be sent to proof. But in the converse case—viz., where the foreign judgment, instead of being put forward as a ground for execution, is put forward as a plea of *res judicata* in answer to a demand made anew by a pursuer who has failed to establish his claim in a foreign court, or in answer to one who demands restitution against a sentence pronounced and executed abroad—the foreign judgment cannot be examined. The reason of this Erskine puts thus: “For the defender, in whose favour the decree was given, does not in such case apply to the court for its aid, but, on the contrary, rests entirely on the sentence recovered by him in a foreign court confessedly competent in the cause; and so in effect excepts to the jurisdiction of the judge before whom he is called as having no authority over that court, nor any right of reviewing its sentences” (*Erskine ut cit.*) So, too, Lord Braxfield, L. J. C., in *Watson* (21st Jan. 1792, Bell’s 8vo cases, p. 107): “A *res judicata* is good all the world over. The courts here would have no right to review this final judgment.” But these dicta do not apply to decrees in absence, and, generally, a judgment to claim such effect must be “regularly and solemnly pronounced.” More on Stair, p. 6.

In England and America, as in Scotland, the procedure by which execution is done upon the judgment of a foreign court, is by raising an action in the English courts founded upon this judgment, just in the same way as if the claim were one arising out of a contract. As in all the systems we have noticed, the foreign judgment must be such as execution could follow upon in the country where it was pronounced, and must not be subject to appeal there. The court which pronounced the judgment must have been competent to do so, either as being a court of the domicile of the defender, or of the country of his nationality. That the contract on which judgment was given was intended to be performed in the same foreign country is "a very material circumstance," but the possession of landed property is not thought to be sufficient to justify a foreign court in exercising a general jurisdiction over the person possessing it. The English courts would not recognise the abnormal jurisdiction claimed by the French courts in all cases where the pursuer is a French subject. There must also have been due citation of the defender, and the judgment must not impinge upon the maintenance of public order or of morality in England. A foreign judgment when obtained in a competent court, unless it has been so obtained by fraud, cannot, as a general rule, be questioned either for error in law or for error in fact. This is true even when the law applicable to the case was English law, and was misinterpreted by the foreign court; and the maxim applies both to the case of a foreign pursuer who comes to England to enforce the decree he has obtained abroad, and to the case of a defender who protects himself in England by pleading a foreign judgment as *res judicata*. The American rule is substantially the same (Wharton, §§ 167 *et seq.*)

By the Judgments Extension Act of 1868 (31 & 32 Vict. c. 54), judgments of the supreme courts of one of Scotland, England, or Ireland will have the effect of judgments of the supreme courts of the other two if duly registered, as directed by the Act, in the other two territories. This enactment applies to decrees in absence as well as to decrees *in foro*, unless when the decree in absence is pronounced in Scotland after jurisdiction has been founded by arrestment.]

## MODE OF EXECUTION.

## § 127.

The law of the place where execution is to take place regulates the mode in which it shall take place,<sup>1</sup> even although the judgment should assign some particular mode.

The debtor cannot appeal in the foreign country to the fact that a particular mode of doing diligence—*e.g.*, arrest of the person—does not exist in the provisions of the local law to which the obligation is subject.<sup>2</sup>

If, however, according to the law of the place of execution, a particular form of doing diligence is only recognised in the case of particular exceptional obligations, this kind of execution arising out of the contract can only be applied if it is at the same time recognised as competent in the kind of claim in question by the law under which that claim itself falls.<sup>3</sup> If, for instance, personal incarceration is by the law of the place of execution competent in obligations upon bills, but is not recognised by the law to which the obligation upon the bill in question is subject, in such a case this form of diligence cannot be required at the place of execution.<sup>4</sup>

<sup>1</sup> P. Voet, de Statut. x. c. un § 9 ; Huber, § 7 ; cf. Anton. Matthæus, i. § 21, No. 38 ; J. Voet, in Dig. xlii. 1, § 39 ; Hommel, Rhaps. Quæst. vol. i. obs. 409, No. 10 ; Bouhier, chap. 32, No. 1 : Spangenberg, in Linde's Zeitschrift für Civilr. iii. p. 429 ; Mittermaier, Archiv. für die Civil Praxis, xiii. p. 295 ; Massé, ii. No. 325 ; Fœlix, ii. §§ 313, 330 ; Burge, iii. p. 1049.

<sup>2</sup> Demangeat, on Fœlix, ii. pp. 236 *et seq.* Draft II. of the Code for the States of the German Bund, § 29 : "Diligence is to be done according to the regulations of the procedure in diligence recognised at the place where it is carried out. If the judgment pronounced in the one State has allowed personal arrest as a means of doing diligence, that can only be enforced in the other under the condition that such personal arrest is recognised there in the same way as a means of execution competent in the circumstances. If this condition does not exist, then it is only the means of diligence authorised by the other State which can be required."

<sup>3</sup> Cf. Story, §§ 568 *et seq.*

<sup>4</sup> Cf. judgment of the Supreme Court at Berlin, 10th July, 1860 (Seuffert, xiv. p. 282), and *supra*, § 86, note 10.

## VI. SPECIAL KINDS OF PROCEDURE.

## A. PROCEDURE IN BANKRUPTCY.

## § 128.

Procedure in bankruptcy is simply a general execution of diligence against the whole estate of the bankrupt for the purpose of due ranking and payment of all creditors: this process is carried on where the law places the centre of the bankrupt estate—*i.e.*, at the domicile of the bankrupt.

To this end, the whole estate is laid under a general arrestment in favour of the whole body of creditors, and by this means the bankrupt loses all power of alienation, although he retains his general legal capacity of acting,<sup>1</sup>—so that, for instance, he is able to take up or to renounce a succession falling to him, which no one who had lost his capacity of acting could do, although, of course, he cannot lay the bankrupt estate, which consists of his whole present property, under any obligations. The estate is sequestrated by a representative of the creditors (*curator bonorum*, syndic, trustee), who also represents the bankrupt, and, where it is necessary, is managed by him and realised with the assistance of the court, while all the creditors are called upon by public notice to give in their claims against the bankrupt.

But, since it is assumed that the estate is not sufficient to pay all its debts, any claim which may be made affects the interest of every creditor, and, therefore, any creditor who believes that his interest is endangered by the claim of another creditor is entitled to interpose in the suit of this creditor against the bankrupt, and to lay claim to the subject under sequestration, which may either be the whole estate or a part thereof, so as to operate his own payment either preferentially or *pari passu*. This right to interpose, in which the bankrupt has no interest, leads to special suits between individual creditors for preferable rankings.

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<sup>1</sup> Neither does bankruptcy give the creditors a universal succession to the estate of the bankrupt, who does not lose his radical rights to the estate until it is realised and alienated by the trustee, just as any other debtor retains his right of property in articles given by him in security until they are sold.

From these characteristics of bankruptcy procedure,—which is deduced by a perfectly logical process from general principles of procedure, and must, therefore, necessarily follow the lines here indicated, wherever it exists, although with many deviations in matters of detail,—we can reach the rules for its proper treatment in international law.

From the nature of arrestment it follows that the withdrawal of the power of disposal from the bankrupt does not extend to property belonging to him which is situated abroad,<sup>2</sup> and, therefore, that he is in a position to grant perfectly valid conveyances of property so situated, so long as it is not withdrawn from him by a special decree of arrestment on the part of the foreign judge.<sup>3</sup>

This arresting of funds or estate abroad may be brought about by the trustee appointed to represent the creditors, or by other creditors in the foreign country,<sup>4</sup> and the foreign judge must, therefore, have the power and the duty of setting

<sup>2</sup> Mevius, in Jus. Lub. iii. tit. 1, arts. 10 and 56; Pufendorf, *Observ.* i. obs. 127; J. Voet, *Comment.* xx. 4, § 12; Massé, No. 324; Merlin, *Répert. Faillite*, sect. 2, § 2, art. 10; Judgment of the Faculty of Law at Göttingen in Böhmer, *Rechtsfälle*, i. No. 82, p. 648, n. 17; Gand, No. 628; Judgment of the Supreme Court of Appeal at Lübeck, 19th Jan. 1824 (Seuffert, v. p. 439); Supreme Court of Appeal at Cassel, 1st March, 1834 (Strippelmann, iv. 1, p. 186); Supreme Court at Berlin, 16th July, 1857 (Striethorst, xxvi. p. 131).

<sup>3</sup> Massé, Nos. 62, 72, 314; Demangeat, on Fœlix, ii. pp. 206-7. The bankrupt continues to have a *persona standi in judicio* till the local bankruptcy begins or a general arrestment is laid upon the property he holds there. Demangeat, ii. p. 204; Judgment of the Supreme Court at Berlin, 11th May, 1858 (Striethorst, *Archiv. Jahrg.* ii. vol. i. p. 291). The judgment of the Supreme Court of Appeal at Cassel is to a different effect, 16th Dec. 1848 (Heuser, iv. p. 167). Since incarceration is only a means of compelling payment from the debtor, it cannot be used against one who can show that his whole property is in the hands of a foreign court of bankruptcy or a trustee. Burge, iii. p. 778; Wheaton, § 88, p. 120; Fœlix, i. p. 207, § 89, are of a different opinion, because the beginning of a bankruptcy changes the legal capacity of a person. But, as we have seen, this is not the case, and is not required to attain the end of the procedure. Special privileges, which can only be enjoyed by merchants who are quite solvent,—e.g., the right to appear on exchange,—are denied to a foreign bankrupt (cf. Massé and Demangeat as cited), because, on a reasonable interpretation of the law, all bankrupts, no matter where the process of sequestration depends, are excluded from such privileges.

<sup>4</sup> Cf. Demangeat, ii. p. 207.

on foot a general execution of diligence in conformity with his own law in such circumstances, in order to attach the property which lies within his own jurisdiction.<sup>5</sup> This is not, however, to be admitted, in the absence of special legislative enactment, if the bankrupt only possesses isolated assets within the jurisdiction of the foreign judge, or if it is only isolated debtors to the estate who are domiciled there, but is only to be admitted in accordance with the character of the process if the bankrupt possesses a complete collection of property there, such as a trading house or a manufactory, or a farm. Except in such special cases, the foreign judge must give effect to the foreign arrestment laid on the bankrupt's estate, since there is always an imminent risk that the property will be squandered when the debtor is insolvent—a fact which is ascertained or shown to be highly probable by the decree of the foreign court. The further question, whether the estate or the proceeds realised by a sale of the assets are to be handed over to the court of the domicile where the sequestration has begun, and to the trustee appointed by the court, is, in the first place, like the question with which we have just dealt, dependent upon whether the judge is bound to institute a special process in conformity with his own law. It is, however, essential that no creditor should have laid on any other arrestment in the meantime,<sup>6</sup> and no real right

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<sup>5</sup> Cf., e.g., the Prussian Concursordnung, 8th May, 1855 (G. S. p. 321, § 292). The B. P. O. of Hanover of 8th Nov. 1850, § 605, permits a separate sequestration to be raised in all cases on the application of any interested creditors.

<sup>6</sup> So the practice of the Supreme Court of Appeal at Cassel (Dec. S. Trib. H. C. i. decis. 5, ii. decis. 224); Böhmer, Rechtsfälle, i. No. 82, § 22. The more recent practice of England and Scotland lays down that a sequestration awarded abroad attaches the moveables of the bankrupt *ipso jure*, and holds, therefore, that any arrestment subsequently laid on is invalid: in real estate, the opinion is the contrary. Burge, iii. pp. 906-20; Story, § 409. The practice in America, again, coincides with that stated in the text. Wheaton, § 139, pp. 187-88; Story, § 410. The ground adopted to justify the English practice—viz., that the transference of the property to the curators (assignees or trustees) must be regarded just as a transference by contract or marriage—would apply to real estate as well; but, as American jurists remark, the difference is that the transference of the bankrupt's right to the creditors often takes place *in invitum*, and, in any case, has no feature in common with the transference of any definite right of the bankrupt. Besides, the English procedure is not by

should have been acquired which will give a title to object to the transference of the estate to another court. If this has not happened, and if sequestration has been awarded with the concurrence of the bankrupt, this gives the trustee, at the lowest, the right of a mandatary<sup>7</sup>: in this character the trustee can bring the estate to a judicial sale and pay in the proceeds to the court of his own country. If the bankrupt has opposed the sequestration, the foreign court must then be satisfied that the conditions, under which any other judgment pronounced by the court where the sequestration depends would fall to be put into execution abroad, exist in the case before them: there will, as a rule, be no difficulty in doing so, in so far as the court of the sequestration is in truth the *forum domicilii*.<sup>8</sup>

All secured creditors have a title to resist such transference;<sup>9</sup> their right is in a question with an arrestment, which gives a mere security right, older and stronger. They have a right to demand that the *judex rei sitæ* should decide their claims, or the *judex domicilii* of any debtor of the bankrupt over whose debt their security is constituted, and should satisfy them out of the funds realised by the security, having first, of course, entertained an action to settle the shares which each is to take; this right they have because a foreign court in determining the order of preference might possibly shut out all application of the *lex rei sitæ* to which they are entitled to appeal, and proceed according to its own

any means logical, as has already been shown (§ 113 *ad fin*) by reference to the doctrine as to the administration of the estate of a party deceased.

<sup>7</sup> Massé, No. 314. See, as to the practice in Hesse-Cassel, Strippelmann, iv. 1, p. 182.

<sup>8</sup> Matters would be different if the bankruptcy procedure began at some place where the bankrupt had, perhaps, a factory, and not at his domicile. It is possible for the bankrupt to have various complete estates in different places, and a different process of bankruptcy may be set on foot at each of them,—if, for instance, he has trading or manufacturing establishments in various countries. In such a case we must inquire to which of these estates the particular asset found in another country naturally belongs—*e.g.*, whether an outstanding debt was incurred for this or that concern.

<sup>9</sup> Cf. as to the practice in Hesse, Heuser, Ann. ii. pp. 534-54. The ordinance of 25th April, 1826, introduced some changes to the advantage of foreigners.

law exclusively, and thus if the estate were transferred, the rights of these creditors might be imperilled. After satisfaction of the secured creditors, who may for convenience be cited edictally, and in opposition to whose claims the foreign trustee and the foreign creditors may interpose to discuss their liquidity and relative priority, the estate must be handed over to the foreign court of bankruptcy under the conditions already laid down.

The ranking of the various claims will be determined by the law of the court of the sequestration.<sup>10</sup> A law which regulates such ranking is truly an injunction laid upon the judge to satisfy the individual creditors in a certain order; in so far, however, as the ranking depends on the existence of any security-right and its effect in questions with other competing securities, the law of the court of the sequestration must allow the ranking to be settled by the rules of preference which obtain in the law of pledge. This is the *lex rei sitæ* in the case of immoveable property and such moveables as are permanently intended to remain in some particular place or which the debtor has not in his possession (goods delivered in pledge or property laid under arrestment), and the *lex domicilii* of the debtor in the case of all other moveables.<sup>11</sup>

It follows from the equality of natives and foreigners in the eye of the law that the latter can intimate and follow out their claims in the same way as the former.<sup>12</sup> But if several processes of bankruptcy are in dependence such claims can

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<sup>10</sup> Judgment of the Supreme Court of Appeal at Dresden, 28th October, 1859 (Seuffert, xiii. p. 321), and at Rostock, 19th October, 1846 (Seuffert, xi. p. 3).

<sup>11</sup> In accord with this, Rodenburg, ii. p. 1, c. 5, § 16; J. Voet, in Dig. xx. 4, § 38; Ant. Matthæus, de Auction, i. c. 21, No. 35; Ricci, Entwurf, pp. 552, 560; Bouhier, chap. 32, No. 9; Boullenois, i. p. 553; Danz Privatr. i. § 53, p. 179; Burge, iii. pp. 770-71; Fœlix, ii. §§ 537-38; Story, § 423a. An exception is, of course, admitted, if delivery of the subject can be refused by reason of some opposing right, or because there is another process of bankruptcy depending. As to privileged security-rights in moveables, *supra*, § 65, note 29.

<sup>12</sup> Cf. Fœlix, ii. § 539; Burge, iii. p. 908; Story, § 846, note; Bayer, Con-curs. Process. § 21, p. 62. In some local systems we still find particular creditors set at a disadvantage, although that occurs rarely now-a-days.



only be considered in so far as they have not been satisfied out of that estate to which they naturally and directly belong.

We have already said all that it is necessary to say as to the discharge of claims in bankruptcy, and the *beneficium competentiae* which arises out of a *cessio bonorum* (see §§ 78-79). The rejection of a claim by reason of its not having been timely intimated affects, according to the rules laid down above, nothing beyond the property situated in the State where the sequestration is pending, so long as the trustee has not used arrestment over foreign estate of the bankrupt. If, however, the claim was of a kind that could only be competently advanced in the court where sequestration was awarded at the time when it was awarded, a subsequent assignation of it to a foreign debtor would not found a claim of compensation for him against a claim by the trustee, since the *concursum* of debtor and creditor, which is at the root of a plea of compensation, could only be carried back to a point of time at which the original creditor had already lost his right to make any such claim in the bankruptcy.<sup>13</sup>

If several sequestrations are awarded in several different countries,<sup>14</sup> every creditor may appear in every one of these proceedings, unless some have a right to a separate sequestration. But, since a creditor is not allowed to appear, unless he thereby vindicates some interest, no claim can be advanced for ranking and payment, unless he was not paid or not paid in full in the process in which he first appeared.<sup>15</sup> For the same reason creditors must first make their claims

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<sup>13</sup> Cf. Judgment of the Supreme Court at Mannheim, 16th May, 1861 (Seuffert, xiv. p. 369). The judgment, in accordance with the principle on which I have founded in the text, regards a sequestration instituted abroad as in itself of no effect in this country, but in any event comes to the conclusion that the plea of compensation should be declared incompetent, because no one can assign a right which he himself does not possess, and further that one who has a right assigned to him must suffer all pleas which could have been urged against it as it stood in the person of the cedent to be urged against him.

<sup>14</sup> Or in different provinces. Cf. *supra*, § 125, note 30; Böhmer, *Rechtsfälle*, vol. i. No. 82, p. 648; as to England, see 12 & 13 Vict. c. 106; *Rep.* 32 & 33 Vict. c. 83. See, too, Savigny, § 374; Guthrie, pp. 260-61.

<sup>15</sup> Cf. the case given by Striethorst, xxvi. pp. 133-34.

in the *forum* appropriate to them ; if, then, one possesses a trading establishment in a foreign country, any claims which do not refer to its affairs can only come to be regarded in the sequestration which takes in that establishment as an ultimate resource, and must in the first place be made at the domicile of the bankrupt, and, if necessary, the creditors concerned must take measures to have sequestration awarded there.

The right to challenge<sup>16</sup> bargains or payments made by the bankrupt before the beginning of the proceedings in the sequestration,<sup>17</sup> and the nullity of these bargains and payments is simply a retro-active operation of the law of bankruptcy, and is therefore primarily dependent upon that system of law<sup>18</sup> which prevails at the seat of the thing affected,<sup>19</sup> and in a corresponding way if the thing affected has no perma-

<sup>16</sup> See Puchta, Pandekten, § 380, as to the *Actio Pauliana* of the common Roman law. English law has rules quite peculiar to itself. If the real owner has allowed the bankrupt to deal with moveables (except some such as ships), claims of debt, bills or stocks, so that he passed in the commercial world for the true owner of them, he must as a rule be content to allow the creditors, if the estate of the bankrupt is not sufficient, to apply these in payment of their debts without any regard to the rights of the true owner : this is the doctrine of reputed ownership ; cf. 12 & 13 Vict. c. 106, § 125. A trader or a person in a similar position is held to be bankrupt, and any dispositions of his property granted by him are null so soon as he has committed an Act of Bankruptcy ; certain exceptions to this rule are made in favour of one *in bona fide*. Cf. the statute cited, § 126 and Güterbock ; Bankruptcy according to English law, in Goldschmidt's Zeitschrift für des gesammte Handelsrecht, Jahrgang. ii. 1, p. 34. If we compare such rules as these with the rules established by the common law of Rome, it will serve to show the practical impossibility of carrying out the view, by which bankruptcy will be universally subjected to the *lex domicilii*.

<sup>17</sup> In some countries the bankruptcy of a trader is distinguished from the insolvency of other persons. It is so in England. Stephen, ii. p. 147 *et seq.*

<sup>18</sup> This is overlooked in a judgment of the Supreme Court of Appeal at Rostock, 19th October, 1846 (Seuffert, xi. p. 4), in which it is laid down that a foreigner does not acquire by his business transactions in his own country rights against others who desire to proceed according to the law of this country, because those persons against whom these preferences are claimed, do not place themselves under foreign law to this effect ! This judgment also proceeds upon the compulsory character of the bankruptcy laws. See, on the other hand, *supra*, § 33.

<sup>19</sup> Bouhier, chap. 31, No. 15.

ment seat, or is not laid under arrestment, or if the transaction challenged is the payment of a sum of money, upon the law of the domicile of the person who has received payment or delivery,<sup>20</sup> for any diligence to be done against the estate of the person who has so received payment or delivery must be followed out according to that system of law, and bankruptcy is simply a general and sweeping diligence. But, since the contention of the creditors who challenge the transaction is that the property in question still belongs to the estate of the bankrupt or ought to be brought back into it, they can never claim more than that local law gives them by virtue of which they have the right of using the arrestment—that is, they cannot make any claim beyond what the law of the place of sequestration permits ; in the same way, if property is once acquired and alienated irrevocably, it cannot be subsequently withdrawn from the person who has acquired it, if the disposer should change his domicile and should thereby bring his estate under the bankruptcy law of some other legal system.

It is plain that, if bankruptcy prevents the execution of any judgment pronounced in this country, it will be impossible to give effect to any foreign judgment.<sup>21</sup> This in

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<sup>20</sup> Judgment of the Supreme Court of Appeal at Lübeck, 15th December, 1834 (Senffert, v. p. 1) : “ The capacity of acquiring property in goods coming to hand after declared insolvency is determined, not by the law of the place where they were received, but by the law of the domicile of the person who is said to have acquired it.” [By a decision of the Appeal Court of Milan, it is said to be by the law of the bankrupt's domicile (Sottocasa, 14th August, 1865).]

<sup>21</sup> So long as no separate process of sequestration is begun upon the estate of the bankrupt in this country, or the delivery of the estate in this country to the foreign court has not taken place, it is quite competent to raise a separate action against the bankrupt if he is under the jurisdiction of the courts of this country,—Judgment of the Supreme Court at Berlin, 11th May, 1858 (Striethorst, xxix. p. 291). If, however, the bankrupt sued here has no more property at all here free from the control of the trustee or from his arrestments, in my opinion it is incompetent to incarcerate him, since, according to modern legal views, that merely constitutes a particular and a sensible mode of compelling satisfaction of obligations undertaken by the debtor, and must therefore cease if the debtor is innocently unable to satisfy his creditor. The only exception allowed is, if, according to the law of the country, some different meaning must be attached to personal diligence—*e.g.*, that it is an indirect method of forcing third parties to interpose.

my view would be the result, even if the execution could be demanded on the ground of a public treaty. The creditors have, by the general arrestment over the estate in this country, acquired a right to exclude a special execution until they are satisfied.<sup>22</sup>

We must now examine the opposite view, which gives a general operation to a process of sequestration once begun in any country, and demands that the whole estate should be given up to one bankruptcy court—*i.e.*, to the *judex domicilii* of the bankrupt, or to the trustee appointed or confirmed by that judge.<sup>23</sup>

This view, so far as its juristic justification is concerned, is partly based upon the fact that the bankruptcy embraces the whole estate of the bankrupt, and hands it over to the creditors, and that, therefore, just as in a case of universal succession, the *lex domicilii* should apply; and partly upon the fact that the object in view is to set various creditors, who all make claims upon the estate as the subject of diligence, upon an equal footing, and therefore this process can only take place in one locality, which is the domicile of the bankrupt.<sup>24</sup>

The former ground is certainly wrong; bankruptcy is no universal succession,<sup>25</sup> for if it were, the creditors would be responsible for the bankrupt's debts, at least to the amount of the estate. The second ground contains a *petitio principii*, it must first be shown that the bankrupt's whole estate, even what is situated abroad, would for the purposes of diligence be held to be an *unum quid*, and the preferences due to

<sup>22</sup> Cf. Draft Code for the States of the German Bund, § 12: "If a sequestration is awarded in any German State, then, in so far as bankruptcy sists the execution of all judgments by the law of that State, no judgments of any other German States can be carried out while it subsists. Even after the winding up of the bankruptcy no judgment can be carried out in this State against the discharged bankrupt if the claims made against him are by its law discharged by a forced agreement, or if the *beneficia legis*, which the bankrupt as such enjoys through that law, exclude or restrain the use of further diligence."

<sup>23</sup> Dabelow, Bankruptcy Procedure, p. 746; Gönner, Handb. iv. No. 82.

<sup>24</sup> Savigny, § 374; Guthrie, p. 258.

<sup>25</sup> It depends, for instance, upon the creditors whether particular assets shall go into the general estate or not.

some creditors, although they may only affect single assets, are in direct contradiction to equality among the creditors in the sense here implied.

Again, as a matter of expediency,<sup>26</sup> it is pointed out how many difficulties are created by awarding various separate sequestrations. These difficulties admittedly do exist, but the opponents of this practice will only exaggerate them by the procedure they advocate. The *judex domicilii* alone is to rank and prefer the creditors, or at least is to determine by the *lex rei sitæ* the preferences which relate to real estate. Thus, again, we find different estates springing up; the difficulty is not avoided; the difference is that the decision is not given by the judge who is familiar with the local law, but by one who does not know it. If, however, preferences over moveables are ruled by the law of court of bankruptcy, the rights acquired at the place where the thing is situated are invaded,<sup>27</sup> and we must remember that it is not only real rights, but personal privileges (*privilegia exigendi*) that must be protected.<sup>28</sup> But, lastly, if a general and sweeping operation is to be attached to the award of sequestration, transactions by the bankrupt, which he enters into abroad and in connection with his property situated abroad, are to be held invalid.<sup>29</sup> But if we recollect that the notices of the award

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<sup>26</sup> Feuerbach, Themis, p. 115, thinks that principles of positive law are out of place here, and that considerations of expediency alone must decide the question. He comes in this way to the conclusion that sequestration should be awarded where the greater part of the bankrupt's estate lies, and a separate process should only take place if the bankrupt has a manufactory or trading house abroad. But, as a rule, the principles of positive law will be found to be the most expedient.

<sup>27</sup> Take the case, for instance, that a creditor who holds property in pledge is not required by the law of the place where that property is, to give it up to the trustee, while he is required to do so by the law of the bankrupt's domicile. According to our view (p. 597), such an invasion of his right is impossible, if he puts forward his claim.

<sup>28</sup> See the analysis of the Draft Code I. p. 47.

<sup>29</sup> This is the result of the judgment of the Supreme Court of Appeal at Lübeck, 23rd Jan. 1860, and at Cassel, 13th Dec. 1859 (Seuffert, xiv. p. 327), which determine the incapacity of the bankrupt to conclude legal transactions on general principles of legal capacity. The former recognises that, where the law of the court of bankruptcy only regulates certain particular kinds of transactions, so as to determine the extent and conditions of their

of sequestration would naturally be given with most prominence only at the place where the court sits, the security of legal rights is imperilled to the uttermost. If, for instance, a foreigner possessed a trading house in this country, and sequestration of his estates were awarded at his domicile, then—without any notice of the sequestration being required here—all payments made by our subjects to the establishment here would be thrown out of account in any question raised against the debtors by the creditors claiming in the bankruptcy.

It may be objected that the view we adopt imperils the rights of the creditors, while the opposite view does not create any greater risk for third parties in another country dealing with a bankrupt who is by the law of his domicile to be held incapable of contracting, than the risk which exists for any parties who deal in a foreign country with persons labouring under any other legal incapacity. But, in the first place, the creditors are quite at liberty either to lay arrestments on the property of the bankrupt, or to raise a separate process of sequestration ; in the second place, other kinds of capacity are much more readily ascertained by any party proposing to contract with another ;<sup>30</sup> and, in the third place, the threatened danger is much diminished by the fact that in most cases a person who is legally incapacitated has no considerable amount of property in his hands,<sup>31</sup> while, again, a person so incapacitated is always bound to answer for any

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effect upon the whole estate, or their liability to be challenged in the joint interest of the creditors, the effect which the material insolvency of either of the parties to a disposition of this special kind, or the formal origination of a sequestration of their property can and shall produce, is not settled solely by the law of the court of bankruptcy, but that substantial consideration is given to the law of the place to which the transaction in question belongs, either in its origin or its effects, or with which the other party is connected, either personally or by property.

<sup>30</sup> Age and sex offer unmistakeable tokens of what they are ; even the case of the *prodigus* is different. It is hardly conceivable that a man should suddenly burst out from being a quiet citizen into such extravagances as to need to be placed under curatory ; but sequestration may come very unexpectedly.

<sup>31</sup> See *supra*, § 52.

*dolus* in which he has involved himself,<sup>32</sup> and if such a person claims restitution, a plea of *versio in rem* will bar his claim, while neither of these remedies are applicable in questions with creditors in bankruptcy.

By some German treaties the *forum domicilii* is made the only competent seat of sequestration, but only under important restrictions,<sup>33</sup> and always with the proviso that real rights, at least over immoveables, should be settled by the *lex rei sitæ*.<sup>34</sup> It must be remembered that there is no security of this kind if there is no treaty, and although we may concede so much in terms of a treaty to a neighbouring State with similar laws of bankruptcy from motives of convenience, it might be far from advisable in the case of other States, where there is no treaty. The interests of the creditors in this country would be in the highest degree endangered, if we were to hand over the estate in every case and without discussion to a distant court.<sup>35</sup>

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<sup>32</sup> It may constitute *dolus* if a person misleads others into thinking that he is incapable of legal acts by the law of his domicile, or keeps up such a belief on purpose. Cf. *supra*, § 52, note 12.

<sup>33</sup> The convention between Bavaria and Würtemberg, for instance, provides that a separate process of sequestration shall take place—

First, in favour of creditors on a succession, who, in view of the succession, claim the extraordinary right of setting aside a portion of the estate.

Second, if the bankrupt possesses, either in the one State or the other, a separate shop, manufactory, or the like, which makes it right that a separate process of sequestration should be originated for behoof of the creditors who have given him credit by reason of the existence of that establishment.

The treaty between Prussia and Weimar, in article 20, provides: "A separate sequestration is not allowed unless a right to separate the estate recognised by law can be pleaded,—*e.g.*, if the bankrupt has in another State from his domicile a separate shop, work, or establishment of that kind, which creates a separate circle of rights and obligations as a complete whole in itself. Krug, pp. 32-34.

<sup>34</sup> Cf. Krug, pp. 37-39. The convention between Prussia and Saxony, in article 20, provides: "In the same way, before the estate is surrendered to the court of bankruptcy, all rights of vindication, pledge, hypothec, or other rights conferring a preference, and recognised by the law of the country where the estate is, may be pleaded before its courts as against the assets of the estate found there, and the creditors may operate their own payment from the proceeds of the estate, and hand over to the court of bankruptcy only what remains, while the same court will settle all disputes arising between creditors, or with the trustee in bankruptcy, or in the process of liquidating or succession as to the authenticity or preference due to any claim.

<sup>35</sup> See, too, the grounds of judgment reported by Story, p. 514, note.

*Note AA, on § 128.*

[In considering the principles of the law of bankruptcy, and the decisions of the courts applying these principles in some of the European States, we shall first note the jurisdiction claimed by different countries as entitling their courts to award sequestration of the estates of an insolvent debtor, and thereafter examine the effect which is attributed to an award of sequestration, and particularly how far such an award in one country will be recognised in another, so as either to prevent diligence being done there against assets lying there, or to make it incompetent to award another sequestration.

First, then, as regards the grounds on which it is held competent for the court of any country to award sequestration against an insolvent, it may be remarked that the exigencies of commerce have established a recognition of the authority of the courts of another country in matters of this kind, in circumstances which many legal systems would hold insufficient to give jurisdiction for other matters. We have seen that nationality or domicile, or personal service or arrestment, are the usually recognised modes of constituting a jurisdiction over a defender, and that in questions of status a permanent relation between the parties and the country whose courts are called upon to adjudicate is universally required. The sequestration of any person may, in so far as it affects the capacity of disposition, be regarded as being a question of status, but yet the necessity and high convenience of dividing the assets at the place where the claims upon them have arisen, have established a generally recognised rule, that an individual may be sequestered where he has been domiciled or has traded, a company where it has traded. In England a debtor domiciled there may be adjudicated bankrupt on an act of bankruptcy committed either in England or abroad, and a trader, trading but not domiciled in England, may be adjudicated bankrupt on an act of bankruptcy committed by him in England, being such as would in the case of an English trader constitute an act of bankruptcy; a company technically domiciled in England may be sequestered and wound up there; a company not techni-



cally domiciled, but carrying on trade in England, may be wound up there, but cannot be dissolved by the court. The criterion seems to be that it is under the control of persons domiciled in England, and this criterion has been applied to bring a Spanish railway company, a German mining company, a Mexican mining company, and a Belgian railway company to be wound up in England (Lindley on Partnership, p. 1233, and cases cited there).

In Scotland sequestration may be awarded when the debtor has within a year resided, or had a dwelling-house or place of business, in Scotland ; or in the case of a company, if it has within a year carried on business in Scotland, or had a place of business there ; or in the case of an unincorporated company, if any partner has resided or had a dwelling-house in Scotland. There seems to be no reason to prevent the Scots courts exercising in the case of foreign incorporated companies the same jurisdiction as the English courts exercise, as noted above ; in the case of any company domiciled—*i.e.*, registered—in Scotland, they have full jurisdiction.

In Germany domicile, or a manufacturing, trading, or industrial establishment, will give jurisdiction in the case of an individual or of a company (§ 208 of the Bankrupt Code). In Belgium domicile will confer this jurisdiction.

In France it is sufficient that a company has a trading establishment in France and is under French direction, or that an individual has carried on trade in France, to render that company or individual liable to be declared bankrupt by the French courts (*Cie de Chemin de Fer de Nord Ouest de l'Espagne v. Jarousse*, 17th July, 1877, C. de Paris ; *Samman v. Souchay et Cie*, 20th May, 1878, C. de Paris ; C. de Cass. 19th March, 1872) ; and an English undischarged bankrupt, who is carrying on business in France, may be sequestrated there of new (*Devaux' Tr. v. Geisweiler*, Trib. Comm. de la Seine, 10th May, 1881).

Second, as regards the effect of sequestration once awarded by a competent court. Here the principal question for determination is, whether such a sequestration is regarded as universal, and is held to affect the bankrupt's estate wherever it is situated, barring foreign creditors from using diligence

in their own country subsequently to its award, so as to attach assets lying there, and giving the trustee a good title to do diligence and recover that estate, both in the country of his appointment and in other countries.

In England and Scotland while real estate situated either in one or the other is not affected by sequestration issuing, except from the courts of that country where the estate is situated, the universality of the bankruptcy is recognised as regards moveables. In Scotland it has been decided that the mercantile sequestration of a bankrupt in a foreign country renders a subsequent award of sequestration in Scotland incompetent (*Goetze v. Aders*, 27th November, 1874, 2 R. 150). This decision proceeds upon the ground of the unity of the moveable estate, according to the rule *mobilia non habent situm*, and determines no more than that the title of a foreign trustee will receive effect from its date, and entitle him to ingather the estate in Scotland, but it is expressly said that questions of preference among Scotch creditors may have to be determined by the law of their own territory. This reservation is in accordance with the doctrine of the text, although the main decision is expressly counter to the expediency of separate sequestrations there maintained. A necessary consequence of giving effect to the appointment of the foreign trustee from its date, will be to prevent the subsequent use of any competing diligence by arrestment or the transference of any of the insolvent's property in Scotland. By the law of England, a foreign trustee, while his appointment gives him no title to real estate, or to property for the acquisition of which any particular form of conveyance is required, is entitled to administer all chattels personal and choses in action in England (Westlake, § 125, p. 142); even although such a foreign trustee is present in England, the English court will not interfere with him unless it is shown that his absence from the country of the bankruptcy prevents redress from being had there (Westlake, § 127, p. 144). A British creditor obtaining payment of his debt after the beginning of an English bankruptcy, must pay over the amount to the trustee in all cases; a foreign creditor is only bound to do so if he claims a dividend. Both in Scotland and England a foreign creditor has the same rights and will receive the same

recognition in bankruptcy proceedings in either of these countries as a native.

In competing bankruptcies within the United Kingdom, it is provided, as regards Scotland, by a statute of 1860 (23 and 24 Vict. c. 33, § 2), that the Court of Session may recall a sequestration awarded in Scotland, where a majority of the creditors reside in England or Ireland, or where the Court shall be of opinion that the Bankrupt or Insolvent Laws of England or Ireland should regulate the distribution of the estate (cf. *Cooper v. Baillie*, 23rd January, 1878, 5 R. 564).

In Austria, the unity of bankruptcy procedure is not recognised, and sequestration even in one province of the Austrian Empire—*e.g.*, Hungary—does not attach moveable property in another province—*e.g.*, Austria proper (Sup. Ct. of Austria, 20th March, 1877). Much less will a foreign bankruptcy be held to have any such effect.

In Germany, by the Bankruptcy Statute of 1877, foreign creditors have as good a title to appear in bankruptcy procedure as German creditors: it is not necessary to prove the insolvency of a debtor in Germany so as to give a foreign trustee right to sue *eo nomine* in Germany, or, with the consent of the bankrupt, to ingather assets and realise estate situated in Germany; but, on the other hand, the foreign bankrupt does not lose the power of administering and disposing of his estate from the date of bankruptcy, which has been awarded in a foreign court; but although he may dispose of that estate or transfer it to his trustee, that is only permissible if no diligence has been done against it in Germany; to prevent that, a process of bankruptcy must be opened and a trustee named in Germany; till then execution is allowed to creditors against assets lying in the Empire, although the foreign assets are affected by a foreign bankruptcy, unless recognition of the foreign bankruptcy is effected by a special order of the Chancellor of the Empire. Preferences over real estate are to be ranked and satisfied according to the law of the Empire. A decision of the Appeal Court of Cöln prior to this statute (*Sauer v. Wolff*, 22nd July, 1877) had laid down that a sequestration did not cover estate situated abroad, and that its effect was not to incapacitate the bankrupt from acting, but merely to vest

the trustee with the property, and that this operation could not take effect by force of the decree of any court beyond its own territory.

The unity of bankruptcy procedure is, however, the principle that regulates international bankruptcies in Italy and Belgium, as we have seen that it does in England and Scotland as regards moveables.

In Italy it has been laid down, and is settled law, that the divestiture of a bankrupt by a decree of bankruptcy must be allowed to have the same effect in all countries, and independent diligence after the date of the decree by Italian creditors in Italy will be stopped. "This is in conformity with the aim of bankrupt law, which is to facilitate a distribution of the bankrupt's estate proportionally among all his creditors" (*White v. Mack and others*, Ct. of App. at Milan, 15th December, 1876).

The Belgian courts have refused to declare a company, legally domiciled in London, but carrying on business in Belgium, possessed of real property there, and carrying on undertakings there, bankrupt after a winding up order has been pronounced in London (*Belgian Public Works Co.*, 7th August, 1871, Trib. Civ. de Bruxelles).

The Court of Brussels, on 13th August, 1851, in giving judgment said: "It is a fundamental principle that sequestration carries its effects into every country where the bankrupt has estate; the administration of that estate is one, indivisible and universal, operating upon the whole property of the bankrupt, wherever situated. This principle depends upon the interests of commerce and also upon the nature of things, which alike forbid that there should be in one bankruptcy as many different administrations as there are countries where the trader had property." On this principle an arrestment of a debt due in Belgium was held to be inept after the debtor had been declared bankrupt abroad (*Wolff v. Coprais*, Tr. 29th April, 1874): the same was held as to the creation of any security which might diminish the available estate (Trib. de Neufchateau, 9th February, 1871).

By the law of France, a French creditor may require a foreign trader, who has already been declared bankrupt abroad, to be anew declared bankrupt in France if he has a

trading establishment there : the appointment abroad is evidence of the fact of bankruptcy, but French interests must be protected, and the bankruptcy law is a law that touches public order and police (*White v. Lamoureux*, 7th March, 1878, C. de Paris); the French courts may appoint a trustee with directions to co-operate with the foreign trustee, but where there are substantial effects in France the foreign trustee will not be allowed to act alone (*Tought v. de Stenay*, C. de Nancy, 8th May, 1875); a foreign creditor will be allowed to rank in France if he has not been satisfied abroad, but there will be a separate sequestration (*Vanderstichelen v. Pfeffer*, 28th August, 1881, Trib. Comm. de la Seine). The fact of the foreign decree of bankruptcy, and of the nomination of the trustee, will be recognised so that he will be held to be the proper person to sue and be sued in matters affecting particular assets of the bankrupt's estate in France : for this he requires no confirmation at the hands of the French courts (*Lublin v. Possel*, 20th December, 1876, Trib. Comm. de Marseilles; C. de Paris, 22nd February, 1872; *Haussen v. Delorme*, C. de Paris, 14th December, 1875). But where a trustee appointed abroad proposes to do diligence on French estate, to take decree against some French subject, or to use his position as trustee to some practical end, he must obtain an *exequatur* (*Haussen v. Delorme*, *ut supra*, C. de Paris, 28th January, 1873; *Colpin v. Des Granges*, 21st December, 1877, Trib. Civ. de la Seine). Without this he can do no diligence. A French creditor, too, is allowed to use diligence—*e.g.*, arrestment—over moneys found in France, in order to secure payment to himself of dividends that have yet to be declared in a foreign bankruptcy (*Maynard v. Vernhes*, 13th August, 1875, C. de Paris); but a foreign bankruptcy is recognised to the effect that, where a foreign bankrupt was sued in France, he was allowed to plead his foreign bankruptcy so as to sist proceedings against himself, that he might show what was the state of the foreign bankruptcy, and prove his allegation that by allowing the action to proceed in France injustice would be done to the great body of creditors (*Borelli v. Pagliano*, Trib. de Comm. de Marseilles, 7th December, 1876). This does not, however, contradict the other decisions which determine that where

there is any estate truly of a separate nature—*e.g.*, a trading house—that then there must be a separate bankruptcy process in France.

The law of America is identical with that of Austria (Wharton, § 390).]

## B. SUMMARY PROCESSES AND DILIGENCE UPON CONTRACTS.

### § 129.

It is of course obvious that a summary process which is at variance with the ordinary methods of procedure can only take place under the conditions which are recognised as admissible at the seat of the court applying it.<sup>1</sup>

On the other hand, it seems to be doubtful, when the place of the court exercising jurisdiction in some question arising out of a contract does not coincide with the place of the contract, whether the defender can be compelled to submit the issue to be tried by a summary process, unless that form of procedure would be employed at the *locus contractus* also. The answer to this question must depend upon whether the law of the court derives the applicability of a summary process from some bargain of parties, which may be a tacit bargain, that speedy diligence should follow upon their contract (*parata executio*), which is certainly the case in Germany by the common law as regards summary processes upon liquid documents of debt,<sup>2</sup> or whether it is merely the nature of the proof adduced by the pursuer that determines the question. In the former case, if the defender objects, a summary process is only admissible if it should be the fact that the law of the place of the contract enjoins it.<sup>3</sup> In the latter case, it depends entirely upon the law which regulates the court.

<sup>1</sup> Molinæus, in L. 1, C. de S. Tr. ; Burgundus, v. 1 ; Huber, § 7 ; Hert, iv. 69 ; Christianæus, Decis. vol. i. decis. 283 ; Hommel, Rhaps. Quæst. vol. ii. obs. 409, No. 10 ; Boullenois, i. p. 253 ; Merlin, Questions voce Authentique Acte, § 2 ; Massé, No. 269.

<sup>2</sup> Cf. Briegleb, History of Diligence (Geschichte des Executionprocesses).

<sup>3</sup> Colerus, de Proc. Execut. ii. c. 3, Nos. 21-23 ; Marianus Socinus, *de foro competentis*, ix. 2 ; Bald Ubald, ad L. 1, C., *ne filius pro patre*, 4, 13, No. 10 ; Alderan Mascard. Concl. vii. No. 80 (as regards the exclusion of peremptory objections), are generally of this opinion.

The laws of some countries allow, in the case of those obligations which are undertaken by certain public documents, immediate execution to compel the prestations contained in them. Such obligations must always be considered as arising upon contract.<sup>4</sup> These documents cannot enjoy any greater influence abroad than belongs to them by the law of the place where they originated, and by the intention of parties.<sup>5</sup> But just as little as a foreign judgment can a public document executed abroad justify any officer charged with the execution of diligence<sup>6, 7</sup> in carrying it out.

VII. APPENDIX.—POSITION AND RIGHTS OF PERSONS ENTITLED TO PLEAD EXTRA-TERRITORIALITY, AND OF FOREIGN SOVEREIGNS AND GOVERNMENTS AS SUITORS.

§ 130.

The compulsitors of the courts of a country, in which a person entitled to plead extra-territoriality happens to be, cease to have any effect in questions with him. The forms of judicial procedure which would apply if he were still in the country of his domicile must be observed; and on that account citations, unless in the case of a special renunciation of the privilege,<sup>1</sup> seem only to be competent according to diplomatic forms. Judicial procedure, however, which might take place even although the person concerned were not actually in the State in question, is not tied up to any particular forms or conditions by his position. Real actions,

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<sup>4</sup> Cf. Alber. de Rosate, lib. i. qu. 18, § 2.

<sup>5</sup> Massé, No. 330.

<sup>6</sup> Pardessus, v. No. 1487; Gand, No. 622.

<sup>7</sup> In relation to the diligence of arrestment, a judgment of the Supreme Court at Berlin, 11th June, 1859 (Striethorst, xxxii. p. 118), remarks: "Every use of arrestment alters the rights and duties of the arrestee in a way which cannot be determined by the laws of any other territory, nor by the orders of a court to which he is not subject."

<sup>1</sup> Ambassadors need the consent of their sovereign to any such renunciation (Heffter, § 42, p. 84, note 5). If the ambassador is in the country of the sovereign who accredits him, citation may take place through the courts of that country, for there he has no privilege of extra-territoriality.

for immoveables especially, may be raised *in foro rei sitæ*; and the *forum contractus*, or even the *forum arresti*,<sup>2</sup> is not excluded, if it is always kept in view that, in order to found any of these forms of jurisdiction, it is never possible to use the fact of the presence of the person entitled to the privilege, or the presence of any property in his possession, to which the privilege also applies,<sup>3</sup> as a ground for the jurisdiction. Such a person must, however, always fulfil obligations which he undertakes as a pursuer—*e.g.*, the obligation to pay expenses; and a native of this country may require caution for expenses from him, just as from any other foreigner.<sup>4</sup>

There is no doubt that foreign sovereigns and foreign States may appear as pursuers in actions; but it is disputed, on the other hand, how far they are entitled to appear as defenders. It seems a sound view to distinguish the case where some obligation of the sovereign or of the State is called in question, which depends upon an act that is competent only to the chief magistrate of the State, or upon formal law, from the case where the obligation rests upon a legal relation in which any private person may be engaged, and which cannot be referred to any public law. In the former case, we shall reject the competency of foreign courts;<sup>5</sup> in the latter, only allow their jurisdiction to be exercised under the same conditions as those on which it would be founded against any private individual,<sup>6</sup>—without prejudice, however, to the claims of extra-territoriality.<sup>7</sup> For instance, a creditor could not sue a foreign Government on account of

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<sup>2</sup> Vattel, iv. §§ 114-15; Wheaton, § 227, p. 287; Bynkershoek, *De foro Legatorum*, ix. § 9b.; Klüber, § 210; Heffter, § 42, vi. 7; Gand, Nos. 71-2.

<sup>3</sup> See on that point, Vattel, ii. § 113: "*Toutes les choses qui appartiennent à la personne du ministre, en sa qualité de ministre public tout ce qui sert à son usage, tout ce qui sert à son entretien et à celui de sa maison; tout cela participe à l'indépendance du ministre et est absolument exempt de toute juridiction dans le pays.*"

<sup>4</sup> Cf. Heffter as cited; Vattel, iv. ch. 8, § 111.

<sup>5</sup> Story, § 542a.

<sup>6</sup> Cf. Vattel, ii. §§ 213-14; Gand, No. 12.

<sup>7</sup> The result of this is that foreign ships of war can never be laid under arrestment, while foreign war material not attended by an escort, such as horses bought in any country, may be so attached.



some loan contracted by it, and resting upon a financial resolution or act; whereas a merchant who had supplied goods to a foreign Government could, under certain circumstances, sue in the *forum contractus*.

If a foreign Government requires from our courts any legal remedies, it must subject itself to the conditions which are required by our law for this purpose, and, in particular, it is bound to find caution for payment of expenses.<sup>8</sup>

The opposite view,<sup>9</sup> according to which no Government can be sued in foreign courts except in real actions as to immoveables in the *forum rei sitæ*,<sup>10</sup> does, in truth, surrender the rights of its own subjects entirely to the mercy of the foreign sovereign, and gives him privileges which are not enjoyed by the sovereign and the Government of its own country. It is incorrect to say that the view we have taken is at variance with the independent position of States.<sup>11</sup> If any foreign Government desires to possess property in this country like a private person, it must share the obligations incumbent upon such persons. An undertaking executed by a foreign Government in our territory, with consent of our Government—*e.g.*, a railway—cannot, however, be regarded as a private undertaking, if a similar undertaking, executed by our own Government, would be considered as one of our public works. If, then, a private person cannot sue in the latter case for the removal of the undertaking, neither can he in the former case.<sup>12</sup>

<sup>8</sup> Massé, No. 248, and judgments cited there. Fœlix, i. § 217.

<sup>9</sup> Mailher de Chassat, No. 186; Fœlix, i. § 215.

<sup>10</sup> Cf. the English statute, 7 Anne, c. 12 (Blackstone, i. p. 456).

<sup>11</sup> To the opposite effect, see especially Demangeat, i. p. 418. It seems as if the judgments of the French courts cited by Fœlix referred solely to cases in which the foreign Government did not contract as a private person. In the case decided by the Court of Cassation, 22nd Jan. 1849, the question raised was as to the right of a Frenchman to sue a foreign Government, he having held a public position under that Government, and having received salary from it. Cf. Gand, No. 17.

<sup>12</sup> Judgment of the Court of Brunswick in deciding a question of jurisdiction, 26th May, 1857 (*Zeitschrift für Rechtspflege in Braunschweig*, 1857, p. 182). The Royal Hanoverian General Board of Direction of Railways and Telegraphs was the defender. The question was as to the construction of the Southern Hanoverian Railway.

*Note BB, on § 130.*

[The English cases on this subject are collected in Mr. Westlake's book, pp. 211 *et seq.*; some of these and some decisions of foreign courts have already been referred to here (cf. *supra*, § 115, note, pp. 492 *et seq.*)

The distinction between the contracts of a sovereign and his representatives in their public capacity, and the property belonging to them for public services, or employed by them for these services on the one hand, and the contracts or property of the same persons in their private capacity, used by them for the ordinary affairs of commerce, has been taken distinctly in France and America, and has been advanced in England by Sir R. Phillimore, although his opinion has not been received with much favour in later cases.

That a foreign Government or sovereign cannot be sued in the courts of another country, and that this exemption extends to the ambassador and his suite, and even to consuls in the discharge of official duties, is the primary rule; and from this it follows that property belonging to such privileged persons cannot be attached. This rule is settled in England by 7 Anne, c. 12, § 3; and by such cases as the *Magdalena Steam Navigation Company v. Martin*, 1859, 2 E. and E. 94, 28 L. J. (Q. B.), 310; *Parlement Belge*, 1879, L. R. 4, P. D. 129; *Duke of Brunswick v. the King of Hanover*, 1844, 6 Beav. 57, and 2 H. of L. 20. In the case of the *Parlement Belge*, Brett, J., in delivering judgment, said: "As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every Sovereign State to respect the independence of every other Sovereign State, each and everyone declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to its public use, or even the property of any ambassador, though such sovereign, ambassador, or property be within its territory and subject therefore, but for the common agreement, to its jurisdiction." In this case the Court, reversing a judgment of Sir R. Phillimore, held that they were precluded from inquiring into the facts of the employ-

ment of a vessel which had caused damage to an English ship—*i.e.*, from inquiring whether she was mainly employed in commerce or not, by a declaration of the King of the Belgians that she was a public vessel and in his possession as sovereign.

This general rule is approved in France (Cour de Paris, 23rd August, 1870 ; Cour de Nancy, 31st August, 1871) ; these decisions establish that a foreign government cannot be sued in France, and this is confirmed by a decision of the Cour de Paris, 15th March, 1872, where a Parisian jeweller sued the Emperor of Austria and the other representatives of the Emperor Maximilian of Mexico for decorations, crosses, &c., supplied for the use of the Court and military establishment of Mexico. These furnishings were held to have been made for State purposes, and not therefore to found an action for their price in the French courts, which would in the ordinary case of a private person have had jurisdiction. The Belgian courts (Trib. Civ. de Bruxelles, 3rd November, 1870), in a suit at the instance of La Banque de Crédit Foncier et Industriel against the Emperor of Austria, as guardian of the minor children of the Princess of Tour and Taxis, held that they could not entertain a suit against a foreign sovereign ; that that quality was inherent in him, and that he was necessarily invested with the privileges of extra-territoriality.

A military attaché has been held entitled to the same privileges in a suit against him for furnishings (*Dientz v. de la Jara*, Trib. Civ. de la Seine, 31st July, 1878) ; and the French courts have also held, in the case of the envoy of the Republic of St. Martin, that no arrestment can be used of the goods of a foreign plenipotentiary.

But while the general rule is as has been stated, an exception in accordance with the doctrine stated in the text is allowed where the sovereign or his representative acts in a private capacity ; in a suit at the instance of the brothers Mellerio, jewellers in Paris, against Queen Isabella of Spain, for the price of jewellery supplied both before and after the revolution of 1868, which drove her from the throne, the Cour de Paris (3rd June, 1872) held that as the Queen had ordered and used the goods in a private capacity she could

be sued. In the American court, in the cases of the United States *v.* Wilder (3 Sumner, U.S. 308), and the Schooner *Exchange v. M'Faddon* (7 Cranch. U.S. Supreme Court Rep.), a distinction is taken between the public and the private property of a State, and two exceptions are indicated as existing to the general rule as to the non-liability of foreign Sovereign States to be sued; the first being where the State engages in trading, the second where it is possible, by attaching property, and thus proceeding *in rem* to avoid the indignity and embarrassment of personal service. These grounds of judgment are adopted by Sir R. Phillimore in the case of the *Charkieh* (7th May, 1873, A. and E., vol. iv. p. 59). The possession of real property in England creates an exception by giving scope for proceedings *in rem* (*Taylor v. Best*, Jervis, C. J. 14, C. B. 487, 522). Cf. also Lord Brougham's opinion in the case of the Duke of Brunswick *v.* the King of Hanover, 2 H. of L. 24. The secretary of a legation may waive his privileges (*Taylor v. Best*), but it is questionable whether a sovereign could (cf. Belgian decision quoted *supra* in the case of the Emperor of Austria). The tendency of the English courts, however, is to be very chary of admitting any such exceptions (cf. the Parlement Belge, *supra*).

A foreign sovereign can, however, sue in a foreign country; and where "a fund is in the Court of Chancery, that court may proceed to administer it even although a foreign sovereign may be interested in it, and may not think fit to come before the court in a suit relating to it," per Lord Cairns, C. in *Larivière v. Morgan*, 1875, L. R. 7, E. and I. A. 423. But although the Court will interfere so as to prevent a foreign government from taking possession of a fund to which they have no title, they will not pronounce any order against them to compel specific performance of a contract, nor entertain the suit unless a trust or some right of property or hypothecation in the fund be proved. See Westlake, p. 216, § 183. The principle is explained in the case of *Smith v. Weguelin*, 1869, L. R. 8, Eq. 198, where the Court of Chancery was asked to pronounce an order against the agents of the Peruvian Government ordaining them to pay the proceeds of a quantity of guano lodged in their hands by that Government to certain bondholders, the

government having contracted with the bondholders that the loan and interest should be met in that way. The case of *Gladstone v. Musurus Bey*, 1862, 1, H. and M. 495, was cited, but in giving judgment it was said by Lord Romilly:—"In that case the court did not enforce the specific performance of any contract between the foreign Government and the English company, nor did it assume any power to do so, but as an English company had deposited a sum in the hands of a third party to await a certain result, the court interposed directly to prevent the foreign Government from taking possession of this fund until it had established that, according to the contract with the English Government, it was entitled to do so. . . . All that it did was to prevent the foreign Government from dealing with the fund as its own before it was shown that the amount was forfeited." The order asked was refused in respect that there was no hypothecation of the fund such as to admit the jurisdiction of the court.

As a necessary condition of the effective administration of any fund by the Court of Chancery, it must be shown that there is some trust created in the agent who holds the fund, or that the fund is hypothecated or is the property of the claimant; this is the kind of jurisdiction which Lord Campbell (*Duke of Brunswick v. King of Hanover*, 2 H. of L.), and Lord Langdale (*ib.* 6 Beavan), professed themselves as ready to sustain; how difficult it is to establish any such trust, hypothecation, or property may be seen from the case of *Larivière v. Morgan* quoted above, reversing a decision reported in L. R. 7 Ch. 550, and the cases cited by Westlake, *sup. cit.*]

## Fifth Part.

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### CRIMINAL LAW.

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#### I. HISTORICAL DEVELOPMENT.

#### § 131.

WE have already noted that no rules for modern criminal international law can be drawn from the Roman or the Canon law.<sup>1</sup>

The inquiries, too, of the Italian jurists of the Middle Ages have in this department a comparatively trifling value for us. Possessed by the idea of a universally valid law for the whole world, which they called *jus commune*, in relation to which the criminal code of any particular territory seemed to be merely a set of special rules, they, for the most part, range the whole subject under a discussion of the competency of the jurisdiction of this or that judge, a point of view which is of no great importance in public law.

In accordance with this idea, all crimes upon the one hand committed by foreigners in this country would be subjected, upon the ground of the *forum delicti commissi*, to the magistrate of this country ; it seemed useful, however, to extend the *forum domicilii* which existed for all personal actions, in

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<sup>1</sup> The best special treatises on this subject, including the question of extradition, are the treatises of Berner and V. Mohl, already cited, in which the whole literature of the subject is thoroughly utilised. Berner deals rather with the criminal, and Mohl with the international aspect with special reference to extradition. Fœlix, in this part of his work, does little more than furnish what is certainly a magnificent collection of materials.

the first place to the formal action for penalties sued by the injured person,<sup>2</sup> and thereafter to the official *inquisitio* which took the place of these actions ;<sup>3</sup> some punishment, according to their theory, must be imposed by the *jus commune*, and by whom it was inflicted seemed a point of little importance, which might be settled by considerations of expediency. These considerations recommended that a State should not give up its own subjects, while no crime should go unpunished ; the former, because the exercise of jurisdiction was a privilege guarded with jealous care, and one that brought with it no small profit by way of fine and frequently of confiscation ; the latter because so small, and so much divided were most of the Italian territories, that it would otherwise have been impossible to maintain general safety and order.

Where, however, they had to deal with any matter which was punishable merely by some territorial law, and not by the *jus commune*, or where the law of the criminal's domicile imposed some different punishment from that awarded by the law of the place where the act was done, then the Italian jurists found themselves upon the same ground as that upon which alone modern jurisprudence stands.

Here opinions were divided. Some were desirous, upon the analogy of contract relations, that the rule of the *lex loci actus* there adopted should rule,<sup>4</sup> while others held that the rule must be settled by the duty of the judge to decide according to his own law, irrespective of the place of the crime, and were often induced to consent to be guided by this rule owing to the difficulties so often connected with the application of the *lex loci delicti commissi*.<sup>5</sup> It was, however, recognised that penal rules might by statute be enacted to regulate crimes committed by natives beyond their own territory, and that the *judex domicilii* was bound to apply these,

<sup>2</sup> See, however, Kleinschrod, Archiv. des Criminalrechts, 1807, p. 381.

<sup>3</sup> Cf. Farinacius, Praxis et Theoria Criminalis, lib. i. tit. 1, de inquis, Quæst. 7, nums. 19-20. Angelus Aretinus, De Malef. Rubr. haec est quædam inquis, num. 83 ; Jul. Clarus, Sentent. L. v. S. fin. quæst. 38, num. 1 ; and Bartolus, in L. 1, C. de S. Trin. num. 47.

<sup>4</sup> Cf. Bartolus, l. c. num. 48. Clarus, l. c. quæst. 85.

<sup>5</sup> Paulus, de Castr. ad L. ult. D. de jurisdict. num. 7 ; Cf., too, Cinus de Pist, in L. 1, C. de S. Trin. num. 3.

and where acts were not prohibited by the *jus commune*, the only requirement was that it should be determined whether, according to the intention of the lawgiver, the act in question should be punished only if it was committed in his own country by one of his own subjects, or even where one of these subjects had committed it in a foreign country.<sup>6</sup>

In that state of opinion the view, started by a few doctors of law, that certain crimes which would imperil the safety of the whole Christian world should be obnoxious to punishment everywhere, was plainly cast aside,<sup>7</sup> since it was only the judge of the criminal's domicile, or of the place of the crime, that possessed the necessary *jurisdictio*, and an exception could only be admitted in the case of vagabonds, who were in civil suits as well liable to be sued wherever they were found.<sup>8</sup>

It was a result of this theory, that a judgment either of acquittal or condemnation pronounced by a competent court and carried out, was recognised even by the court of another territory, unless the judge of the former had proceeded irregularly—*e.g.*, had in violation of his duty inflicted too lenient a punishment upon the convict.

A pardon, on the other hand, was held to be a mere renunciation, and therefore was good only for the jurisdiction of the sovereign who gave it, and could accordingly have full effect in a foreign territory only if the place of the delict and the domicile of the criminal were subject to the same sovereign, a limitation which might also be justified upon grounds of expediency, looking to the abuses of the prerogative of mercy that occurred so often in the Middle Ages.<sup>9</sup>

<sup>6</sup> Bartolus, l. c. ; Clarus, l. c. quæst. 85 ; Paulus, de Castr. l. c.

<sup>7</sup> Cf. Farinacius, l. c. num. 28.

<sup>8</sup> Clarus, l. c. quæst. 38, num. 7. Placentin would have applied the rule "*Ubi te invenero, ibi te judicabo*" to all criminals, because the *delinquens* was in the same position as a *debitor fugitivus*. See, on the other hand, Gandinus, De Malef. Rubr. de furibus et latron ; Bartolus, l. c. num. 44, says too, "*Si judex loco ubi civis meus offenditur, offensam non vindicat, tunc fieri potest statutum contra offendentem extra territorium.*" Baldus Perus, in L. 1, C. de S. Trin. No. 24, lays down the rule that a *forensis* who injures a native cannot be brought to punishment at the domicile of the latter.

<sup>9</sup> Farinacius, l. c. num. 26, quæst 7, num. 27. A judgment of condemnation pronounced by a foreign judge should not be put in force, at least until



As regards extradition (*remissio*), the rules of the Roman law, by which the criminal must, as a rule, be handed over to the *judex loci delicti commissi*, were not considered applicable to the relations of courts of separate territories. It was rather held to be a rule that might be exercised in the option of the *princeps*, in whose territory the criminal might happen to be, but would never be allowed by the *princeps* or *judex domicilii*, since the theories of that time laid it upon a judge as his first duty to maintain his own jurisdiction.<sup>10</sup>

It was in harmony with the Germanic system of personal rights that the *forum domicilii* should be set up as that which should principally be recognised, and as a matter of fact this was for some time held in France to be exclusive.<sup>11</sup> Although therefore, as the different territorial powers grew stronger, and different countries were more and more completely shut off from one another, it was necessary for the sake of maintaining peace to introduce the *forum delicti commissi*, which was approved by the authority of the Roman law, and had already been recognised in the land law of Saxony,<sup>12</sup> yet the *forum domicilii* was as strongly implanted as the other,<sup>13</sup> so that the question was determined according as the *judex domicilii* or the *judex loci delicti commissi* first seized the criminal.

But along with the *forum domicilii* and the *forum delicti commissi*, the German criminal lawyers of the sixteenth and seventeenth centuries set up the *forum deprehensionis* which had been rejected by the Italians, a theory which it was all the easier to adopt as most criminal offences were held to be as much crimes against the law of the empire as against those of the different territories composing it, and many

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after the production of the whole procedure and documents, "*ut cognosci possit de validitate et justitia dictæ sententiæ*," so that the sentence does not enjoy the effect of law. Cf. Farinacius, l. c. quæst. 11, num. 46.

<sup>10</sup> Farinacius, l. c. quæst. 6, num. 30, num. 42.

<sup>11</sup> Hélie, p. 497.

<sup>12</sup> III. 25. See iii. 26, as to the special jurisdiction of the sheriffs.

<sup>13</sup> Gloss. to the Saxon Land Law, iii. 79 ; Carpzovius, Part iii. qu. 110, § 9, says, "*primum forum in criminalibus est forum domicilii*." See G. L. Boehmer, § 7.

imperial statutes expressly made it the duty of the court in whose jurisdiction the criminal was apprehended<sup>14</sup> to adjudicate upon his crime and to punish it, and lastly, because in questions as to whether the *forum delicti commissi* or the *forum domicilii* should prevail, the fact of apprehension was made to decide the question.<sup>15</sup>

It was about the middle of the seventeenth century that doubts first began to be raised as to this treatment of the subject, which did not harmonise with the existence of distinct and independent sovereign States. All admitted that delicts committed within the territory of any State, must be punished in that State; but there was no one prevailing view as to the question how far delicts committed in a foreign country fell under the same jurisdiction.<sup>16</sup>

There was, however, something like a consensus of opinion against the view that there was any obligation to give up fugitive criminals to another State.<sup>17</sup>

As a practical question, there was no occasion for the adoption of that system, seeing that a *forum deprehensionis* was fully recognised and also because the same acts were liable to be punished in the different States according to a common system of law, and any exception there might be was merely with reference to some prohibitory regulation of police which the foreign judge considered it no part of his duty to fulfil.<sup>18</sup> To allow its own subjects to be surrendered would also have contradicted the original theories of Germanic jurisprudence, in conformity with which every man laid great weight upon being tried by his fellows. The special privileges which cities frequently obtained and in virtue of which their

<sup>14</sup> Cf. Reichsabscheid, 1559, § 26; Reichspolizeiordn. 1577, tit. 23, § 2; G. L. Boehmer, §§ 8-10; Zacharia, im Archiv. D., C. R. 1852, p. 35; Tittmann, pp. 4-6.

<sup>15</sup> Farinacius, qu. 6, n. 53: "*Captura personæ præfertur verbali citationi.*"

<sup>16</sup> On this subject see the exposition of the history of the doctrine in Hälschuer, pp. 51-3,

<sup>17</sup> Cf. Carpzov. as cited, § 53: "*Remissiones delinquentium ubivis fere locorum in desuetudinem abierunt;*" and for the latest times of the empire, Leist, Lehrbuch des Deutschen Staatsrechts, 2nd edit. § 167.

<sup>18</sup> Boehmer, § 15: "*Quæ vero civium actiones ex particularibus cujusdam territorii rationibus pro punilibus declarantur, de iis territorii alieni iudex pœnam sumere non obligatur ib.*"

citizens could not be summoned to plead either in civil or criminal matters beyond the bounds of the city, give distinct testimony on this point.<sup>19</sup> There are, however, cases of treaties for the extradition of criminals,<sup>20</sup> and it frequently happened that extradition was guaranteed without any special treaty, upon an assurance of reciprocity.<sup>21</sup>

The only historical result we gain, is that all crimes<sup>22</sup> committed within the territory of the State may be punished by the law of that State, although a foreigner may transgress certain special prohibitory laws in excusable ignorance, or a special statute bind only permanent subjects, exceptions which are really only apparent. This is, however, the only undisputed rule; more recent systems have, as we shall see, adopted the most various principles. Any results which we may have gained through the foregoing inquiry have no substantial interest except for the legislator. They can only so far be practically applied as there may in particular States be a lack of express legislative enactments for the punishment of crimes that have some international aspects, or a lack of undeviating practice to take the place of such enactments, or in such particular cases as are not covered by these rules.<sup>23, 24</sup>

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<sup>19</sup> Boehmer, § 8.

<sup>20</sup> Such a treaty was concluded in 1617 between Brandenburg, Pomerania, and Mecklenburg. See, too, in the latest days of the Empire, the convention between Hanover and Brunswick of 1798. Cf. Marquardsen, § 51.

<sup>21</sup> Proceeding systematically, our remarks upon extradition will first be given in discussing the law of criminal procedure. For the sake of historical connection they are, however, alluded to in advance.

<sup>22</sup> See *infra*, § 145, as to the exception in the case of extra-territoriality.

<sup>23</sup> The last often occurs. Cf. the inquiries in §§ 141-42, cases which are not often specially provided for by statute.

<sup>24</sup> Older authors speak of a voluntary subjection of foreigners to the law of the place of the act. But criminal law, upon the one hand, cannot be founded upon any voluntary subjection; and on the other, the end of this argument would be, that any one who did not voluntarily come to the territory, but came as a prisoner, would not be bound by the criminal law of that country. See, on the other hand, CErstedt on the Principles of Criminal Law, i. pp. 137-38.

## II. DIFFERENT THEORIES.

## § 132.

The following theories appear in different legislations, and in the works of different authors :—

1. The theory that a criminal statute is limited to the territory for which it was enacted, and that any act committed in another country is beyond its influence.<sup>1</sup>

The principle of territoriality is founded upon a proposition which all recognise, but which, if more closely examined, cannot be proved, but must be postulated—viz., that every State has the right of punishing criminal acts which have taken place within its own territory, from which it follows directly that each must recognise the authority of its neighbour, which rests upon the same foundation, and will not, therefore, attempt to extend its own authority to acts done in another country ; or that the effect of all laws is confined to the territory for which they were enacted, and that, although in private law, from considerations of equity, exceptions may be recognised, there can be none in criminal law, where such considerations have no place.

But the first proposition is as inadequate to support this conclusion as the second. Although the State cannot immediately compel its own law to be respected in foreign territory, yet the respect due to the sovereign authority of the foreign State does not at all prevent special duties being imposed upon the citizen, which he must observe in any country, and the punishment due to any infringement of that law from being inflicted upon him so soon as he shall return to his own country, a course which is taken by the practice of all countries to a certain extent, even of those

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<sup>1</sup> Story, § 620 ; Lewis, pp. 30, 31 ; Abegg, pp. 17, 18 ; Cosmann, p. 21 ; Klüber, § 63 ; Köstlin, § 23 ; Hälschner, p. 15. Klüber and Cosmann, however, admit exceptions, at least in the case of legislation. The latter recommends, on grounds of expediency, that criminal law should be extended to the acts of subjects by which the State or fellow-subjects suffer. The English, Scots, and American jurisprudence adhere strictly to the territorial principle. Cf. however, *infra*, § 138.

where the principle of territoriality is recognised.<sup>2</sup> Nor can an appeal be made to the fact that the crime is in reality an offence against public order, and can only be an offence against the public order of that State in which the criminal act is done.<sup>3</sup> This is an assumption without any foundation. We may just as fairly say, that to allow a native of this country who has committed serious crimes abroad to go unpunished, is an offence against public order; and must we not be satisfied that a crime committed a few yards beyond our frontier, will have the most prejudicial effect upon the public order of our State? At the same time, to adhere closely to the principle of territoriality raises the most serious dangers for the maintenance of public order. The greatest crimes may go unpunished in a criminal's native country, if, after the deed, committed a few miles beyond the frontier, he can escape from the officers of that State and make his way to the State to which he belongs. The objection may be taken that by extradition to that State in whose territory the act was done, these difficulties may be obviated.<sup>4</sup> But even although a State would give up its own subjects,<sup>5</sup> the difficulty would not be removed by that

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<sup>2</sup> By English law high treason committed abroad is just as much punishable as if committed at home (35 Hen. VIII. c. 2). Lewis, the most ingenious defender of the territorial principle, admits that this is right. Modern English law goes still further; it punishes the crimes of bigamy or murder or manslaughter committed abroad in every case. Lewis, pp. 20-22. [See 24 & 25 Vict. cap. 100, § 9.]

<sup>3</sup> As to the different grounds given in support of the principle of territoriality, see the opinions on the relative article of the *Code d'Instruction Criminelle* given by Berner, p. 95.

<sup>4</sup> So Lewis, p. 49; Henke (i. § 90), who in the same way starts from the principle of territoriality, attempts to justify, on grounds of expediency, the punishment of native subjects on account of offences committed by them in a foreign country, and finds these grounds in the consideration that it is impossible for the State to desire that the criminal should go unpunished, but that it is also impossible to reconcile with the sovereignty of the State the extradition of its own native subjects, or the execution of foreign judgments.

<sup>5</sup> Most States do not allow extradition of their own subjects, and, indeed, it is often expressly prohibited by statute. Cf. *infra*, § 152. The evil results observed in France from her refusal, on the one hand, to give up her own subjects on account of crimes committed by them abroad, and from the immunity of these subjects, on the other hand, if foreigners only were

means. In this theory the possibility of inflicting punishment really depends upon whether the foreign State desires it. Now, the opposite may very easily be the case, and indeed actually is so in many cases, such as crimes against the State.<sup>6</sup> The same considerations exclude the solution which Köstlin adopted; he attributed to the State of the domicile a delegated magisterial power, which it should exercise upon the criminal in the name of the State properly entitled to inflict the punishment. If the magisterial power of the State of the domicile is in truth a mere delegated power, a declaration of will must in the first place be obtained from that State, which is to give the commission to act, and then what shall be the result if this declaration should be a refusal? This might well be in such a case as where in time of war the foreign State had incited a subject of this country to treason. A consequence of Köstlin's theory, too, would be that punishment would take place in accordance with the

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injured by the crime, are excellently painted by Villefort, p. 12. The speech of Laplague Barris, in particular, in the French Chamber of Peers, is worthy of notice, on the bill submitted to the house for alteration of articles 3-5 of the Code d'Instruction of 1843. Cf. too, Breidenbach, i. 1, pp. 251-52.

<sup>6</sup> The adherents to the principle of territoriality frequently admit an exception to the strict rule in cases where the act is done in a foreign country, in order to escape the law of the offender's own country *in fraudem legis* (Henke, i. pp. 606-08; Köstlin, i. p. 24; Marezoll das gemeine deutsche Criminalrecht, § 23). The Bavarian Criminal Code of 1861, which exempts all Bavarians from the law of Bavaria in respect of any acts done by them in or out of Bavaria, if the act in question is not liable to punishment at the place where it was committed, and is not directed against the king, the State, or any subject of the State of Bavaria, makes special provision for punishment if the act was purposely done beyond the Bavarian frontier in order to escape the criminal law of that country. But when one, intending to commit a crime, betakes himself to a foreign country, and appeals to its laws to protect him against the criminal law of his own country, he has not put any false interpretation on any rule of law, for it is precisely because of the principle of territoriality that criminal law is ineffectual in a foreign country, nor has he misrepresented or concealed the facts. To avoid that condition of fact which is necessary to bring the rule of law into play, is not the same thing as defrauding the law. See *supra*, § 35, p. 138. Breidenbach, pp. 258-59: "It is not easy to see wherein *dolus*, in the sense of the criminal law, can be said to exist, if, for instance, any one wishes to express himself in English affairs in the English fashion, and so takes shipping to England."

law recognised at the place where the act was done.<sup>7</sup> But that could hardly be carried out in practice, unless the system of punishment in one State should accidentally coincide with the system in another, because it is impossible in point of fact to compare punishments which are physically different; and although a statute may adjust their mutual values, this is only by a statutory fiction, which does not admit of being extended to similar cases. The same difficulty meets the modification which Köstlin suggests—viz., that any State whose own system of punishment is less severe than that in force at the place where the act was done, is entitled to apply it in the case of its own subjects; for the same process which would be necessary in comparing different punishments is necessary for determining which of two systems is the milder.

But, in the last place, it may be that a crime is committed by a subject of one State against that State, or against fellow-subjects, in some place where there is either no magisterial authority at all, or one that exercises its jurisdiction on uncivilised principles, which we cannot in any way recognise. Is all punishment to be excluded in such cases?<sup>8</sup>

Only a few authors have carried out the principle of territoriality to its full results. The majority have made exceptions upon grounds of expediency, and have attempted to justify them by maintaining that the State has an interest in inflicting punishment in these cases. But if the State has no right to punish a crime which has been committed in a foreign country, how can any interest take the place of a right? We can see no substantial difference, as V. Mohl (p. 734) aptly remarks, between such an argument and a defence or justification of judicial murder.

Then, too, the exception which almost all authors and all

<sup>7</sup> Hälschner, p. 14, lays down that if a State is to inflict punishments, it can only impose those which it thinks just, *i.e.* those appointed by its own law. This is inconsistent with the theory of delegation, which he also adopts, for by his view the State of the criminal's domicile has no right to impose punishment except through the illegality of giving up its own subjects, which is established by positive enactment.

<sup>8</sup> The European Powers are accustomed to exercise a criminal jurisdiction by means of their consuls over their subjects in the East.

systems of legislation allow in cases of crimes committed by native subjects in a foreign country against the State of their domicile itself, cannot be reconciled with the principle of territoriality on the ground that in such cases we must hold that violence has been done to a special obligation of loyalty towards the State of the domicile which is quite independent of the place of present residence.<sup>9</sup> For it is not merely crimes against the State itself which may be regarded as breaches of loyalty : that may be the character of other offences also, as, for instance, in feudal law a gross offence of any kind may be held as an infringement of the good faith due to the feudal superior ; and in modern English law grave offences are to the present day called felonies.

### § 133.

II. A second theory proposes to lay under the criminal law of any State not merely the offences committed there, but also those that are committed by its citizens abroad.<sup>1</sup> This view is chiefly founded upon the assertion that the criminal law lays obligations upon the subjects of the State which it will never permit them to transgress, or in other words, that criminal laws, although they bind every one in the country, even those who are merely there upon a temporary visit, have at the same time the effect of personal statutes. This doctrine is, however, as yet a mere assumption, and is not proved by the reason which some adduce in its support,<sup>2</sup>—viz., that the State protects its subjects even in a foreign country, and accordingly is entitled to require them to observe its laws there ; for, as Hälschner remarks (p. 61), the protection which the State of the domicile extends to its subjects in a foreign

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<sup>9</sup> Marezzoli, § 23 ; Hälschner, p. 64. See, too, Schwarze, pp. 195-96, who no doubt holds the State in whose territory the crime was committed to be primarily, but not solely, entitled to punish it, but holds the crime rather as a breach of the general legal order which must be maintained in all States. See the same idea in the Royal Criminal Code of Saxony, 1855, art. 9. Cf. *infra*, § 135, note 6.

<sup>1</sup> Kleinschrod. N. Arch. d. C. R. 1801, pp. 384-85 ; Heffter, Criminal Law, § 26 ; International Law, § 36 ; Wheaton, § 113, p. 154 ; Witte, p. 75.

<sup>2</sup> Cf. the debates upon the Code d'Instruction given in Berner.



country, is only an international question if it should happen that the foreign country does not fulfil its obligation to give them the protection of its laws while they are resident there. It might just as well be asserted that, since the protection of the criminal law of one State comes to an end when the citizen leaves its territory, so too must the responsibility of obedience to that law. But as a general proposition the protection which a citizen enjoys in a State or from a State does not necessarily imply his subjection to its criminal law. Even those persons who can plead extra-territoriality enjoy the protection of the criminal law in that State in which they reside, without being answerable to its laws.

Just as little can we admit the appositeness of the reason assigned by Berner (p. 126)—viz., that acts which are open to punishment are irreconcilable with the character of a citizen, and that therefore while a man retains his character as a citizen, he may not commit any act that is at variance with it. In the first place, the State forbids all criminal acts within its territory in every case without regard to the domicile of the person who commits them. In the second place, if Berner's conception were correct, the consequence of committing a criminal act would be not punishment, but withdrawal from the position of a citizen. And in the third place, it is not an admitted proposition that an act, which if committed in this country would be seen to be irreconcilable with the character of a citizen, will be regarded in the same light if it is committed abroad.<sup>3</sup>

But the most remarkable consequences follow from an unconditional obligation upon the subjects of any country to be bound by the criminal law thereof even when abroad. Is such a person to be liable to punishment for an act which was sanctioned, or perhaps required by the law or customs of the country in which he was temporarily resident? How can our State ask its subjects to observe all the provisions of our laws which are in conformity with our legal theories, our fashions, and our institutions, in a foreign land, where it may be that every one observes different rules of conduct? These diffi-

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<sup>3</sup> See, on the other hand, V. Mohl, pp. 690-91, note.

culties<sup>4</sup> must necessarily arise if the law of the domicile is to be tied round the necks of its subjects like a rope.<sup>5</sup> If the principle of personality were to be recognised, the logical result would be to require a citizen in a foreign country to observe even police regulations, unless these had a mere local signification.<sup>6</sup>

It is attempted to justify in the following way the limitation of the principle of personality which is so often adopted—viz., that it should affect only crimes committed against the State to which the criminal belongs, or against his fellow-subjects.

In the first place, this is justified by the assumption<sup>7</sup> that the State has no interest in inflicting punishment unless it is itself damaged, or unless its citizens suffer. But this assumption seems scarcely tenable, if we remember that the moral damage done to the community by allowing a serious crime committed by a citizen in foreign territory to go unpunished, is precisely the same whether the person injured is also a citizen or is a foreigner.<sup>8</sup>

But, in the second place, there is here also involved the

<sup>4</sup> See the apt remarks of Schwarze, p. 188, especially p. 191: "Let us suppose that to take the law into one's own hands is criminal in this country, but can only be visited with civil disabilities in another. Is the judge of this country to punish one who returns home after the lapse of years with the criminal consequences of such an act? If, for instance, a subject of Saxony buys a slave in South America, could the courts of Saxony sentence him to a period of imprisonment for this act, which is perfectly innocent in the country where it is committed?"

<sup>5</sup> Lewis, p. 29.

<sup>6</sup> Cf. *infra*, § 141.

<sup>7</sup> S. Cosmann, pp. 34-5.

<sup>8</sup> [Cf. in this connection the provisions of the Act 24 & 25 Vict. c. 100, § 4: "All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the queen's dominions or not, and whoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the queen's dominions or not, shall be guilty of a misdemeanour, and shall" suffer certain punishment. Under this section Johann Most, a German subject, was convicted of inciting to murder the Emperor of Russia by the publication in London of a newspaper called the *Freiheit*. He was sentenced to penal servitude, 18th June, 1881, Q. B. Div. vol. vii.]

proposition that the right and duty of the State to inflict punishment only reach as far as the protection which it gives, and to this protection foreigners in a foreign country have no claim. This reasoning<sup>9</sup> is in any view met by a consideration which we shall advance against a third theory.<sup>10</sup> The serious consequences of letting crimes committed abroad by natives upon foreigners abroad go unpunished are most keenly felt by French jurists,<sup>11</sup> and a remedy has more than once been sought by enactments of various kinds. These proposals have up to the present time been shipwrecked, partly by reason of difference of opinion as to the principles to be adopted, partly by reason of external difficulties.

<sup>9</sup> Feuerbach, §§ 31-40 ; Bauer, § 40 ; Oppenheim, p. 384 (who certainly starts with the principle of territoriality, but ends with conclusions quite contradictory of it). Bauer adds, that any State may expressly threaten with punishment its own subjects in case they shall commit any crime in a foreign country against foreigners or a foreign State ; and may even, in the name of the foreign State, apply the criminal statutes of that State to its own subjects.

<sup>10</sup> See against this limitation especially Köstlin in the *Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes*, vol. xxii. p. 74, and Gross in *Archiv. d. C. R.* 1853, who calls attention to the fact that the question may be raised whether the native who is to suffer punishment must not have known that the injured person was a foreigner. The limited principle of personality is at the bottom of the provisions of the Code d'Instruction, art. 5 : "*Tout Français qui se sera rendu coupable, hors du territoire de France, d'un crime attentatoire à la sûreté de l'Etat, de contrefaçon du sceau de l'Etat, de monnaies nationales ayant cours, de papiers nationaux, de billets de banque autorisés par la loi, pourra être poursuivi, jugé et puni en France d'après les dispositions des lois françaises.*"

Art. 6 : "*Cette disposition pourra être étendue aux étrangers qui auteurs ou complices des memes crimes, seraient arrêtés en France, ou dont le Gouvernement obtiendrait l'extradition.*"

Art. 7 : "*Tout Français qui se sera rendu coupable, hors du territoire de l'empire, d'un crime contre un Français, pourra, à son retour en France, être poursuivi et jugé s'il n'a pas été poursuivi et jugé en pays étranger et si le Française offensé rend plainte contre lui.*" [These articles are severely commented upon by Fœlix, ii. pp. 271-73, see note a, p. 273. The 4th section, subsection 1, of the German Criminal Code of 1871 is nearly identical with art. 5, see *infra*, p. 649.]

<sup>11</sup> Cf. judgment of the Faculty of Law at Paris, reported by Köstlin and Hélie, p. 612. Also the provision of the statute of Wurtemberg, art. 5, by which a less severe penalty is inflicted for crimes committed either in Wurtemberg or abroad, if the State to which the injured person belongs prescribes this milder punishment.

## § 134.

III. A third theory,<sup>1</sup> which recognises that all crimes committed in the country, and all crimes committed by natives abroad, must be punished, proposes to extend criminal law still further, by laying down that the State has a right to protect itself and its subjects from injury, and is therefore privileged to visit any injury with punishment, a principle recognised in most German criminal codes,<sup>2</sup> and also in Russia<sup>3</sup> and Norway.<sup>4</sup>

But although it is true that the protection of persons and property is secured by criminal law, the right to punish does not flow from the right to protect: the latter may justify any measures of defence or self-defence, but gives no right to correct. But even if a law of punishment could be derived from the right of defence and self-defence, yet, since the obligation to protect by punishment lies in the first instance upon the State in which the injured parties are, such a law would be subsidiary only, and the State whose permanent subjects those injured persons are, would primarily have no share in the matter, beyond supporting all other States in applying their criminal law.<sup>5</sup> But, lastly, no punishment can be inflicted except in cases where violence has been done to the law; an act which the law allows or an accidental act cannot lead to punishment. The theory that the injured

<sup>1</sup> Tittmann, p. 1818; Oerstadt. Ueber die Grundregeln der Strafrechtswissenschaft, p. 141.

<sup>2</sup> So, too, the legislations of Bavaria, Oldenburg, Hanover, Wurtemberg, and Thuringia. [These are superseded by the German Criminal Code of 1871, which does not recognise this principle.]

<sup>3</sup> Villefort, p. 52, and Witte, p. 47.

<sup>4</sup> Besides, almost all the States of Europe punish crimes committed against themselves in a foreign country, *infra*, § 138.

<sup>5</sup> Against the extension of criminal law to the acts of foreigners in a foreign country, see Feuerbach, § 31; Heffter, Strafr. § 26; Berner, p. 140. The last certainly assumes that there is a natural right to punish in cases where the foreign State refuses to punish crimes against our State and its subjects. On the other hand, we must remember that there is not really any criminal law arising from a natural condition, such as that into which a State of that kind would throw us, according to the case supposed by Berner. Cf. on the other hand, Leonhardt, Comment. on Hannov. C. G. B. i. p. 68.

party or the injured State is entitled to inflict punishment is therefore a *petitio principii*, because it assumes that the act which it proposes to punish is to be viewed in the light of the law of the party so injured.<sup>6</sup>

A union of such divergent principles (territoriality, personality, and right to protect) must, at the same time, lead to the most manifold doubts and the most irreconcilable results,<sup>7</sup> as is proved by the diversity of the rules that are to be applied for the regulation of the punishment of crimes committed abroad,<sup>8</sup> found in the various German systems of law. Difficulties are specially caused by consideration of the person of the injured party. Who is, for instance, the injured party in the case of a duel where neither has sustained any bodily harm? or who is the injured party in the crime of bigamy, if a husband contracts a second marriage with a single woman who is in perfectly good faith? In the latter case is it only the single woman who is thus deceived that is injured, or is the true wife also injured?<sup>9</sup> If an article is stolen while in the hands of some one who has hired it, is the owner or the hirer only the injured party, or are both injured?

### § 135.

IV. A fourth view requires primarily that all crimes, even if committed abroad, should be punished.

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<sup>6</sup> The principle which Arnold sets up (*Gerichtssaal*, 1857, p. 321), which he proposes to carry back to the right and duty of self-support, and for which he is at a loss to find a satisfactory name, is nothing but that law of protection of which so much use has already been made. The principle of internationality which Arnold introduces, along with that just stated and those of personality and territoriality, is superfluous. For, as we have already endeavoured to show, from the principle of personality we can derive not merely the right to punish citizens who have injured other citizens in a foreign country, but also the right to punish crimes committed by citizens in a foreign country upon foreigners; and it is to prove this last proposition that the principle of internationality is introduced.

<sup>7</sup> See, on the other hand, especially Mohl, pp. 739-40.

<sup>8</sup> Is the sentence to be that which the law of the place of the act appoints, or that which depends upon the law of the domicile of the injured party, or that which is in accordance with the law of the court? See below, § 140.

<sup>9</sup> Cf. Villefort, p. 21.

This may be supported, in the first place, upon the theory of prevention,<sup>1</sup> according to which the State has no other object in inflicting punishment than to protect itself from future injury that may be wrought by the wicked will of the criminal manifested in his act; and upon this theory of criminal law, the view stated above is no doubt correct.

But if we recognise, as almost everyone now does, the falsity of this theory of prevention, it will not serve to support the other.

To appeal to the *forum deprehensionis*, which still exists in individual States, is also inadmissible, as we have already seen.

On the other hand, we must examine closely the grounds upon which it is said that any penal offence has the same character wherever it is committed, and that, therefore, the development of the law applicable to it is not limited by the local limits of any State.<sup>2</sup> It does, no doubt, seem to be an argument in favour of this view, which is, however, subjected to very important restrictions, to be hereafter noticed, even by those who adopt it, that in all civilised States alike, certain acts are reckoned to be serious crimes: these are what we call *delicta juris gentium*; and, again, it cannot be said that one who has committed theft or robbery in one State, can ever be regarded as an honourable man in another.<sup>3</sup> Each State, in accordance with this view, punishes acts even although they are committed in a foreign country, because they imply an infringement of the general reign of law which exists in all countries, and whose positive expression is found in the common and statute law of every State.<sup>4</sup> We must, however, in spite of the ability of the defence put forward for this theory in Mohl's work, resist such a cosmo-

<sup>1</sup> So V. Grolmann, *Strafrechtswissenschaft*, § 107.

<sup>2</sup> Grotius speaks in this or a similar way (ii. c. 20, § 40), and also Vattel (i. ch. 19, § 232); in more recent times Schmid, *Deutsches Staatsrecht* (i. §§ 87-8; Escher, *Vier Abhandlungen über Gegenstände der Strafrechtswissenschaft*, Zürich, 1822, pp. 123-135; Schwarze, p. 194, and Mohl (cf. p. 711 750).

<sup>3</sup> Hélie, p. 586; Hälschner, 62.

<sup>4</sup> Schwarze, as cited.

politan conception of criminal law, because it rests upon a confusion of law and morality. Morality is everywhere the same ; it exists without the sanction of the State, and is drawn directly from the general principle of the highest good ; law, on the other hand, is first called into existence by the sanction of the community of each particular State, and so it can never be held to be the right and duty of each State to submit all criminal acts committed on all parts of the globe to its own criminal law. To this consideration we shall return, in order to establish our own theory.

At the same time, the most manifold practical difficulties rise up against such an extension of criminal law. It will often be necessary to have regard to foreign criminal law, if the foreigner who lives in a remote country, and in circumstances entirely different from ours, is not to suffer a punishment quite incommensurate with his real guilt : this is always attended with great difficulty, and is often impracticable. As a rule, evidence of foreign law is not to hand, and in order to get it other States must lend their help, and thus the issue is dependent upon the goodwill of these other States. Large cost may be incurred without any result, while all possible harm can be simply obviated by extradition ; there is also a risk that the ends of justice will be badly served, if every traveller is forced, in a strange country—where, as a rule, all means of proof, all evidence must be obtained from a distance—to defend himself before foreign courts according to their law. Any such extension of criminal law offers the best possible handle for malicious accusations and oppression, and, at the same time, endangers the independence and respect for the administration of justice, since every State will take up the cause of any of its subjects, and thus the law will continually be threatened by diplomatic intervention.

Only a few States have adopted the rule of bringing all offences, wherever they may have been committed, before their own courts, and these few have only done so under important limitations : either by requiring that an offer of extradition shall first be made to that State in whose territory the crime has been committed, and by giving jurisdiction to its own courts only in the event of this offer being

refused,<sup>5</sup> or else by providing that a special license by the head of the Government shall be necessary to originate such a jurisdiction.<sup>6</sup>

It must be allowed that the former of these limitations, which Mohl (p. 751) describes as indispensable, does much to remove the criminal-political difficulties we have mentioned. If the State, which has the first claim to jurisdiction, is allowed to treat the guilty party according to its own conception of law, and to withdraw him from the jurisdiction of the other, diplomatic intervention and complications will be far more easily avoided. But still they are not entirely removed. It always remains possible that a foreigner should suffer a long period of imprisonment unjustly while an inquiry is being made ;<sup>7</sup> then what is to be the result if the State, to which the privilege of extradition is offered, declines it because there is no sufficient evidence, while in the view of our magistrates there is quite enough to warrant the extradition of the accused ? In such a case there must be some respect shown to the foreign country, but it is difficult to say how much.

<sup>5</sup> So the Austrian Criminal Code of 1852, § 37, and the Sardinian of 1839 (on the latter see Fœlix, ii. § 584). If by the law of the place of the deed a more lenient punishment would fall to be inflicted than that which Austrian law imposes, the provisions of the Austrian code enact that that lenient punishment shall be inflicted, except in cases where the crime is treason against the Austrian Empire or the German Bund, or the forgery of Austrian public bank notes, or coining. See *infra*, § 138-39.

<sup>6</sup> Saxon Criminal Code, 1855, art. 3, 5 ; Brunswick Code, § 205. By art. 8, sect. 2 of the Saxon Code read along with art. 3, any more lenient form of punishment recognised by the law of the place of the deed may be applied, if the deed is not to the hurt of the Kingdom of Saxony or its officers, the head of the State or his family, or other Saxon subjects who at the time of the crime were in Saxony. Wächter, Sächs. Strafr. vol. i. p. 143. By the Brunswick Code, the punishments therein provided are to be invariably applied. On this subject see below, § 140.

<sup>7</sup> It is only necessary to remember that even in modern times it is quite possible that an act may not be punishable in this country which a neighbouring State regards as a gross crime. An act, for example, may be regarded as homicide by our law, and punished accordingly ; while the law of a neighbouring State will hold it to be an act of self-defence. Mohl overlooks this fact.



The second limitation is a mere transference of legislative difficulties to the shoulders of the supreme minister of justice. This will obviate many mistakes by inferior magistrates, but will open the door all the more widely for the interference of foreign Governments in the administration of justice.<sup>8</sup>

It is thus plain that the principle which seems so indispensable for the security of international intercourse,—viz., that crimes shall be punished wherever their perpetrators can be reached,—is in reality a very formidable weapon, which not only may easily injure the innocent, but may most vitally affect the idea of justice held by the State which is to inflict punishment, as well as its dignity and independence.

*Note CC, on § 135.*

[By the 4th section of German Criminal Code of 1871, now in force over the whole empire, it is provided that, as a rule, no punishment will be inflicted for any acts committed abroad: this rule is liable to various exceptions in the case of treasonable practices; and by the 3rd subsection any German may be punished in Germany for an act which is recognised as a crime both in the country where it is committed and in Germany. The Reichsgericht sitting at Frankfurt, on 15th March, 1880, has applied the former rule in the case of a Frenchman apprehended in Germany in possession of stolen bonds, and charged with the reset of these bonds; he had come into possession of them in France, and the court held that it had no jurisdiction over the prisoner, the crime having been committed abroad by a foreigner.

That the law of England does not hold the theory criticised in the text is indicated by the case of the Attorney-General of Hong-Kong *v. Kwok-a-Sing* decided by the English Privy Council (19th June, 1873, 5 P. C. 179). In that case Lord-Justice Mellish says: "The general principle of criminal jurisprudence is that the quality of the act done depends on the law of the place where it is done."]

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<sup>8</sup> See, on the other hand, Pütter's observations, pp. 1, 80.

## § 136.

The different views now explained all rest upon general principles, which directly point at the mutual relations of the various territorial systems of legislation.

Ortolan (No. 880) justly finds fault with this;<sup>1</sup> he remarks that the expressions "territoriality" and "personality," which are taken *a priori* as starting-points for these inquiries, serve only to obscure the subject. It seems proper to him to refer the punishment of crimes committed abroad, just in the same way as of crimes committed at home, to justice and necessity; and, accordingly, to settle the application of penal laws as regards places and persons by these canons. He confuses, however, necessity and expediency; and, as the latter has no definite limits, the results which he deduces seem more or less arbitrary.

Ortolan, however, on coming to details, lays down the following rules:—*1st*, All crimes and offences may, and must, be punished by the State in whose territory they are committed; it is this State whose vigilance has been defied, whose authority has been despised, and whose people have been alarmed and exposed to the risk of the bad example. *2nd*, Crimes against the State itself, its security at home or abroad, its public property, its institutions, and its officers, should unconditionally, and even preferentially, be ruled by the penal law of the State so assailed, since it has the greatest interest in punishing the deed.<sup>2</sup> *3rd*, Other crimes shall only be punished if the criminal at some subsequent time shall be found in the territory of the State whose right to inflict punishment is in question. The presence of the criminal is supposed to be the first thing that creates an interest in society to require punishment, and that, too, only

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<sup>1</sup> Villefort (p. 8) is of the same opinion; but when he maintains that penal law as being a means of restraint, must bind all subjects, even when abroad, and as a means of protection must defend social order and the subjects of its own country everywhere, without regard to the place of the crime or the person of the criminal, we have precisely the same theory as that enunciated above in § 134.

<sup>2</sup> It is not easy to see how this rule can be reconciled with the arguments brought forward to support the first rule.

when the criminal or his victim belongs to that State ; in other cases, extradition or banishment will satisfy the interests of society.

It will be shown directly when we come to seek a foundation for our own theory, in how far objections may be raised against this extension of the penal authority of the State. It need only at present be remarked that the requirement of the presence of the criminal in the territory of the State is only a matter of procedure, and loses all real meaning when criminal procedure in default of appearance is recognised ; it is not a good criterion for determining any material right, and all the less so, that a very pressing interest to have a criminal punished may arise without his personal presence in the country.

### III.—THE PRINCIPLE OF INTERNATIONAL CRIMINAL LAW.

#### § 137.

The proper solution of the question we are discussing must be sought directly in the principles on which the criminal law of a State depends, and the object which such a law has in view. No theory of criminal law can be held to be just which does not account for the development of the first principles of criminal law generally recognised in all civilised States, and at the same time for the obligatory force of the criminal laws of each particular State in international relations. The conception of a State necessarily leads us to the connection of a State with a particular territory, and even the idea of a cosmopolitan State, which never can be realised, does not stand free from such a connection : its territorial limits would, of course, be the whole globe.

We may define generally the object of the State to be the perfection of each individual citizen as regards his social relations to all his fellow-citizens.

We cannot, consistently with the end and aim of this inquiry, undertake to investigate the universal principles of social existence upon which morality and law are both established. We may, however, assume that on the one hand the State, which desires to maintain the principles of

morality, must interfere in certain cases where these principles are infringed, and that on the other hand all acts that are in conformity with the moral law cannot—directly, at least—be exacted by the State from its subjects, and all immoral acts may be directly prohibited. If we were not to admit the former proposition, we should deny all morality to the State, for morality which does not in all circumstances declare itself as the foe of immorality, is no morality at all. Morality is an attribute of the will, and, like the will, requires an act to bring it into existence. If we denied the latter,—which is a limitation of the former,—we should leave no scope for morality in individuals; since we cannot reconcile a direct compulsitor to every moral act, and a direct prohibition of every immoral act with the freedom of the individual, and if this freedom disappears, then individual morality becomes impossible.

In this way we can reach directly the relation of law to morality. Law is the moral principle in so far as its observance can be directly required by the State, morality is the same principle in so far as its observance is left to the free will of the individual.

There are two objections that will obviously be advanced against the reference of law and morality to a common principle. The one consists in a demonstration of the divergence of the laws observed in different States and at different times, the other in the consideration that whereas by our theory a collision between law and morality would be impossible, it is yet the case that if the strict rule of law is rigidly carried out it may often advance the immoral purposes of the individual.

Closer examination shows that both of these objections, instead of destroying our position, rather strengthen it.

1st. That a free and moral intercourse of all individuals in the State may be possible, it is necessary that there should be fixed and generally recognised rules, which shall be maintained by the supreme authority of the State; these rules must control not merely the shares of individuals in material property, and the methods of acquiring and losing these, but must also regulate the position of each human being in the family, the State, and the Church.

Otherwise no one could count with certainty upon the con-

sequences of any act. It is not necessary that these rules should all be capable of being referred to generally recognised principles of morality ; but they are certainly indispensable to the maintenance of social and moral order. If they are once well established, to break them is to break that order. They may be settled in a variety of ways, and they are best calculated to attain their object if they form themselves as exactly as may be in correspondence with the history and actual position of each country, with the manners, customs, and requirements of the people, and the condition of the country. Hence the great variety of positive laws in different States.

2nd. If the State does not propose to abrogate the moral freedom of the individual, it must leave the individual free to infringe the principles of morality to a certain extent, by abstaining from insisting by force upon the observance of these principles after a certain limit. It is a consequence of this principle that the State may not as a rule forfeit or diminish the material wealth of an individual, because he uses it in a way that does not coincide with the principles of morality. A suit by a rich miser against a poor debtor must necessarily be as competent in law as the suit of the debtor against the miser.

But within the domain of law itself we may take a double distinction.

In the first place, when an offence against the law is committed, the State may put itself in motion, either to correct that offence *per se*, without regard to the state of will that was at the bottom of it, or it may take that state of the will into account.

In the former case the activity of the State is confined to taking means to restore as nearly as possible the outward condition of things as it existed before the offence was committed.

In the second case, too, the activity of the State may be similarly confined with this modification, that many equitable considerations which we take into account in the case of an innocent offender against law and order disappear when the origin of the offence is found to be a guilty will.<sup>1</sup>

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*E.g.*, the *bona fide* possessor of a thing that does not belong to him has right to certain fruits, while the possessor *in mala fide* must restore these along with the thing itself to the true owner.

But if the State itself desires to maintain the principle of morality, it cannot in every case restrict itself to a merely external restoration of the true legal position, which either does not interfere at all with the will that has infringed the law,<sup>2</sup> or does so merely in a subordinate way ; it must rather in the case of the most serious offences set itself in motion against this will itself, and this it does by inflicting punishment, the effect of which is to withdraw from the owner of the law-defying will some portion of his legal sphere. It is also a consequence of the same principle that in cases of this latter kind, the State itself will exact the penalty ; but in cases, on the contrary, where there is nothing but a purely external offence against legal right,—in cases, that is, of civil liability,—the State must leave the injured party to claim for himself a restoration of the true legal position ; for this offence against the law, which the State holds to be purely external, is only an offence against the law so long and in so far as the injured party desires to recover the integrity of his legal position, and ceases to be an offence the moment he gives it to be understood, either expressly or tacitly, that he will not again claim what has been taken from him, and therefore separates it from the sphere of rights which is entirely within his own control. After what has been said we need no further discussion to show that the boundary between civil and criminal liability must be differently fixed at different periods in different countries.

Since, then, criminal law by no means finds its foundation in any right to force the individual into a particular fashion of thought or action, but is founded upon the moral end of the State, in virtue of which the State is constrained to resist the law-defying will, we must not, on the other hand, forget that by means of the criminal law a certain measure of compulsion is indirectly exercised upon the current of the individual's actions. If this compulsion is not to lead to a complete extinction of the moral freedom of the individual, there must be only a certain number of particular actions<sup>3</sup>

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<sup>2</sup> This may be found in mere abstinence from action.

<sup>3</sup> This is, of course, not the place to draw all the deductions that might be drawn from this proposition. To strengthen it, however, it may suffice to notice that from it we can account for the inadmissibility of determining by any

included in the sphere of penal offences ; the whole life of a person must never be subjected to penal supervision, but merely certain manifestations of his will, which may, no doubt, in certain circumstances, extend over a considerable space of time.<sup>4</sup> If whole chapters of a person's life were directly subjected to the supervision of the criminal law, the State would become an academy, proposing to itself the task of reforming all its individual citizens, whom it would hold to be immature persons ; this task would be unreasonable, just because the State itself could only be ruled by similar creatures, who would also necessarily have to be considered as immature.

If, then, the penal authority of the State must resist particular manifestations of the will in the individuals, and not regulate whole chapters of their lives, it necessarily follows that, when the essentials of moral guilt are found in any particular case,<sup>5</sup> the interference of the State will be called for, if the particular manifestation of the will<sup>6</sup> was made within the territorial limits of the State in which it is desired to realise the idea of a moral community, without considering whether the personality, with whose act of will we are concerned, belongs permanently to the State or not. The authority of the State to punish extends, therefore, over all acts that take place within its territorial limits, without regard to the domicile of the person who does them.

But, since any particular act is the product of the whole personality, so long as there is any connection of a moral

analogy from common law or statute (quite a different thing from a liberal interpretation of these), whether an act is punishable or not ; *e.g.*, the maxim *in dubio pro reo* has, as far as I know, always been considered merely as an advantage given to an accused person in some particular case ; in this way we can also explain how a person's previous history may be used as a consideration to increase or to diminish his punishment, but can never do away with his guilt altogether.

<sup>4</sup> *E.g.*, illegal imprisonment of any person.

<sup>5</sup> *E.g.*, these essentials may be wanting where a foreigner is excusably ignorant of our law.

<sup>6</sup> By a manifestation of the will we mean an external act. A mere declaration of will cannot be criminally prosecuted by the State, just because purely mental and inward facts must be left to the freedom of the individual, if anything is to be.

kind between the individual and the State, the power of the State to punish cannot be excluded by the fact that the manifestation of the will in question did not take place within the territory of the State to which the individual permanently belongs, but in some foreign country. This rule, as we shall see below (§ 139), no doubt requires an important limitation. The opposite theory, by which all penal action on the part of the State against offences committed by one of its subjects in a foreign country is excluded, must either divide the personality of the individual, in so far as that is made manifest by open acts, into a series of unconnected manifestations of the will, and so fall into contradiction with the end and aim of all penal law, which consists in a reaction of the State against the whole personality of the individual as the uniform centre of all his acts;<sup>7</sup> or, if a penal law is required by the moral character of the relation between the State and the individual, it must deny this moral character to the relation which subsists between the State and any individual subject who may be abroad.

On the other hand, the penal authority of the State can never extend to any other acts than those which are committed by its own subjects abroad, or by any persons within its own territory.

In such cases there is no legal link between the criminal will of the individual and the State. The mischievous consequences which the act might produce in another country, or upon the subjects of another country, would have to be taken as furnishing such a link. This, however, would simply be to establish criminal law upon any external infraction of law; whereas the characteristic of criminal law is that it has a distinct reference to the will of the individual.

If it is proposed, lastly, to postulate a universal criminal law which should, in the first instance, be carried into practice by the State which might be most closely interested in

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<sup>7</sup> If punishment were not directed against the whole personality of the individual, as the uniform centre of all his acts, it could never be inflicted after a lapse of time on account of some previous act. Punishment can only be recognised as a reaction against some act that has previously been done, if we take the uniform personality as the medium which is to bring the crime and the punishment into connection with each other.



it, we should forget, in making such a proposal, that law is not an immediate deduction from the principles of morality which are everywhere recognised, but is a matter of positive enactment in every State, and, therefore, is found in various shapes, while there must always be room within its confines for the exercise of individual freedom. This, of course, does not prevent the leading principles of criminal law in States of the same stage of civilisation having a very similar stamp.

### § 138.

It is not matter of dispute, as we have already shown, that all persons present in a country are subject to the criminal law there recognised.

#### *Note DD.*

[The Belgian law, for instance, will take no cognisance of bigamy committed by foreigners in a foreign country, but if such bigamists shall come to Belgium, the courts of that country will punish them for the adultery committed there, that being by the law of Belgium a criminal offence.—Brussels, 14th Feb. 1878.]

We need only say this much further, that an exception to this rule seems to be inadmissible, even in the case of crimes against the State. Berner<sup>1</sup> very justly remarks:<sup>2</sup> “ He who sets

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<sup>1</sup> P. 83. See, too, Heffter, *Strafr.* § 264, note 1.

<sup>2</sup> [Lord Campbell, in his autobiography, vol. ii. p. 119, says: “ But the question of international law, upon which, of all others, I took the most pains while I was Attorney-General, was this :—‘ Whether, if the subjects or citizens of a foreign State, with which we are at peace, without commission or authority from their own or any other Government, invade the English territory in a hostile manner, and levy war against the Queen in her realm, we are entitled to treat them as traitors ?’ The Canadian Court held that we could not, as they had never acknowledged even a temporary allegiance to our Sovereign ; and of this opinion was Sir William Follet. But, after reading all that is to be found on the subject, I came to the conclusion that they owed allegiance when as private individuals they voluntarily crossed the English frontier ; that it was no defence for them to say that they then had

foot on our territory thereby undertakes to submit himself to our law. This duty is all the stronger the more important the laws which demand obedience are. It is then impossible to convince us that in the very most important laws, by which the State protects its whole existence, we should suffer it to grow fainter, or disappear altogether.”<sup>3</sup>

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arms in their hands, and intended to murder the Queen's subjects; and that they were in the same situation as a Frenchman would be who should land at Brighton with a pistol in his hand, and, seeing the Queen on the beach, should instantly march up and fire at her. This man, all the world would say, might be tried on the statute of King Edward III. for imagining the death of the Sovereign. The Canadian judges very absurdly and inconsistently hold that these ‘sympathisers’ might be tried for murder.” The occasion of which his Lordship speaks was an invasion of certain “sympathisers” into British territory in Canada during the course of the insurrection there in 1839. These persons claimed the privileges of citizens of the United States as exempting them from the penalties of treason.]

<sup>3</sup> Most German criminal codes, in conformity with English and French law (the latter of which, no doubt, does not possess any expression which, like “high treason,” covers all acts of this kind), do not confine the crime of high treason to permanent subjects. Cf. *e.g.*, the Code of Würtemberg, art. 140 (Hufnagel, Commentary, i. p. 340). The Code of Brunswick, § 81 (cf. analysis in Breymann, p. 235). Code of Prussia, § 61. The divergence of the Code of Hanover is only apparent (art. 118), for although this article provides that only subjects of the State shall be amenable to the accusation of high treason, by art. 121 it is provided that the law as to it shall be applicable to foreigners also, unless there should be circumstances in the case which can only be determined by the principles of international law. The provisions of the older Codes of Bavaria and Oldenburg, by which martial law was to be applied to foreigners who in time of peace were guilty of an attack upon the State, cannot be commended. In this way a kind of belligerent right would be given to private persons. Cf. Häberlin, ii. pp. 7-8; Berner, p. 84, note 2. The modern Code of Oldenburg of 1858, art. 4, is in complete conformity with the Prussian Code, and that of Bavaria, arts. 12, 101-14, is so on its principal points. Cf. *infra*, § 138, note 8. The theory that only a permanent subject can commit high treason, is obviously to be explained by the union of two crimes which rest upon different principles—viz., the Roman *crimen maiestatis* and the German crime of treason, which essentially depends upon the infraction of a relation of permanent fidelity.

[The modern Criminal Code for the German Empire, 15th May, 1871, provides—

§ 3. That all criminal acts committed in Germany are punishable according to German law, although the perpetrator is a foreigner.

§ 4. No punishment, as a rule, is imposed on crimes committed abroad, but this rule finds exceptions in cases where—

It is, however, no question of international law whether the criminality of acts directed against the State, or the extent of such criminality, is conditioned by the position of the criminal as a subject of that State. The answer to this question is rather determined exclusively by the conception of that particular crime which has been entertained by the law of the State in question, and developed by its history. At the same time, by the principles of international law it is undoubtedly true that, if the foreigner only discharges a duty laid upon him by his own State, which our State in a similar case would require from its subjects, no criminal law can enter into the question ;<sup>4</sup> but, on the other hand, every State is entitled to impose conditions as it shall think right upon foreigners present in its territory, which shall take effect within that territory ; and accordingly, even in case of war, it may apply its laws as to treason, which exist for its own subjects, to the subjects of the hostile power who remain in its country and under its protection.<sup>5</sup>

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(a) A German or a foreigner has committed in a foreign country any treasonable act against the Empire, or any of its States, or any coining offence, or has committed, while officially employed by the Empire or one of its States, any act regarded by German law as a crime in an official.

(b) A German commits any treasonable act against any of the allied princes in a foreign country.

§§ 84-7. A German who incites foreign powers to war, or combines with them, is guilty of a crime.

§ 102. Where there is reciprocity Germany will punish her own subjects, or foreigners resident in Germany, who conspire against a foreign country.]

<sup>4</sup> There is needed here a careful distinction of the different acts by which high treason may be constituted. An attempt to make it is found in the Code of Hanover, arts. 122-31 ; of Hesse, arts. 139-41 (cf. art. 5) ; and there is there an extension of the notion to acts committed by foreigners in a foreign country, which will be examined below (cf. § 138). The Code of Brunswick punishes irrespectively of whether the criminal is a subject or not, or whether the act is committed in that or any foreign country, all acts that are described as high treason ; except only where they are committed under the protection of international law.

<sup>5</sup> Cf., for instance, the Code of Prussia, § 70. There, besides the provision of § 68, as to service in a foreign army, which, from its nature, can only be applicable to Prussian subjects, it is laid down that "landesverrath" (which is distinguished from the crime of "hochverrath"—high treason—applicable to acts done by foreigners in a foreign country), may be visited with

As regards, however, the extension of the criminal law to acts committed beyond the territory of the State, that cannot be described as an invasion upon the law of the State in whose territory the act was committed. If it is necessary for the maintenance of law and order in the State that it should punish certain acts committed beyond its territory, the right and the duty of doing so is so far justified.<sup>6</sup> No objection can be raised by any other State, for every Government must be allowed the liberty of maintaining law and order within its own territory, and therefore no opposition can be offered to anything that is necessary to that end.

What the State shall consider necessary for the maintenance of its own order cannot depend upon the existence of another State, which shall also hold the act in question as an attack upon its order, and therefore feel itself constrained to interfere. If such a State could not be found, then by this hypothesis the rules which are essential for the punishment of crime and the maintenance of order could not come into play at all.

Let us imagine a well-ordered State, with a well-defined frontier separating it from a territory inhabited by barbarian races, who have no such conception of right and law as their civilised neighbours have.<sup>7</sup> What are we to say as to the application of the criminal law of the civilised State in such a case? Are its subjects to be allowed, if they have crossed the frontier, to commit the most serious crimes against their fellow-citizens and against the State? There can be no doubt that in that way it would become impossible to maintain order in the State, and that therefore, in so far as there was no question of acts which are only amenable to punish-

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punishment in the case of foreigners, if they are resident in Prussian territory and under its protection, while in the absence of these conditions the procedure against foreigners shall be in accordance with martial law. The new Bavarian State Code, art. 110, punishes treason in foreigners who at the time of the act were resident in Bavaria, or were in Bavarian service, excepting, of course (art. 111), service in a foreign army.

<sup>6</sup> We must beware of confusing, like Ortolan (see *supra*, § 136), necessity and expediency.

<sup>7</sup> Circumstances like this occur in the European colonies in Africa.

ment if committed in a well-ordered State,<sup>8</sup> or of acts which could be excused by the actual circumstances in which the subject of the civilised State is living,<sup>9</sup> it is necessary that the power of punishment should be extended to the acts of subjects beyond the territory.

The following considerations, however, will confirm the extension of the criminal law to acts of subjects of the State committed abroad.

In the first place, according to the principles of public law, crimes committed on board of ships upon the high seas are considered as having been committed in the territory of the State whose flag the ship is entitled to carry. Although this extension of criminal law is founded on the fiction that the ship upon the high seas constitutes a roving portion of the territory of the State, this is a mere fiction, and the true reason of it lies in this—that no State has rights of sovereignty upon the high seas, and that, therefore, unless law and order are to be at an end there, the subjects of the State must continue to live according to the law of their native community; and foreigners who walk the decks of the ship shall be received into this community just as if they were treading the territory of the State.<sup>10</sup>

In the second place, persons who by public international law may plead extra-territoriality, are subject to the criminal law of their native States, except in so far as, like their sovereign, they are exempt from criminal law altogether. This, too, can only be explained upon the footing, that when the criminal authority of another State does not step into the place of that which is wielded by the native State, then the latter continues in operation.

Thirdly and lastly, even England—apart altogether from the punishment which is inflicted upon British subjects, in conformity with her own law, and before her own courts, for certain crimes, quite without regard to the place where

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<sup>8</sup> *E.g.*, prohibition against taking the law into one's own hands.

<sup>9</sup> *E.g.*, he may buy a slave, and make use of him on a journey through the uncivilised country. An act which in the civilised State could not be recognised as an act of self-defence may have that excuse when committed in a barbarous country, where there is no well-ordered Government.

<sup>10</sup> [See note at end of the paragraph.]

they were committed,—by virtue of special treaties concluded with the heathen nations of the East, or by virtue of a consuetudinary international law, punishes crimes committed by British subjects in those countries ;<sup>11</sup> and in France, Frenchmen, if they have been guilty of a crime in a heathen country with which France has concluded a treaty for the exemption of her subjects from local jurisdiction, and also where conditions which are in the ordinary case required for the criminal prosecution of Frenchmen are unattainable, are punished according to the law of France.<sup>12</sup> The reason of such a procedure on the part of England and France, observed, too, by other powers, lies in this—that they will not subject their own subjects to be tried and punished by barbarian rules of law before judges who stand upon quite a different grade of civilisation, and that, therefore, the legislation and the courts of the native State will step in wherever the necessary confidence in order and administration of justice cannot be placed in the foreign State.

Fourthly, England, in spite of the principle of territoriality which is generally so stringently adopted by English jurists, subjected all crimes against property or person committed anywhere by British seamen, on board ship or on shore, by the Merchant Shipping Act of 1854,<sup>13</sup> to the jurisdiction of the Court of Admiralty, a legislative Act which it is difficult to reconcile with the theory that crimes have a mere local import.<sup>14</sup>

The most important proof of the extension of criminal law advocated above is, however, in the fifth place, the rule advocated by almost all the adherents of the principle of territoriality<sup>15</sup>

<sup>11</sup> See Lewis, p. 14, on the Acts of Parliament regulating this criminal law, 6 & 7 Vict. c. 94, and 38 & 39 Vict. c. 85.

<sup>12</sup> Cf. Foelix, ii. p. 297, and the judgment of the French Court of Cassation there cited.

<sup>13</sup> Cf. Lewis, p. 24.

<sup>14</sup> Various Acts of Parliament extend the jurisdiction of British courts to the crimes of murder and manslaughter committed in certain uncivilised countries by any person who has been conveyed thither on board of a British ship, Lewis, p. 25.

<sup>15</sup> Köstlin alone seems disinclined, in the first instance, to allow these exceptions, or rather is inclined only to allow them in so far as the State in whose territory they are committed does not impose the same punishment as if the act had been directed against itself.

—a rule, in fact, that is quite indispensable—that the crimes of any subjects against the State continue to be subject to the criminal law of their own State, although they may be committed in another country.<sup>16</sup> We have already seen that to consider this crime as a breach of faith—a course adopted by various authors, in order to reconcile this rule with the principle of territoriality—leads to the so-called principle of personality. Just as little can we recognise the fiction invented by English jurists in order to avoid the discrepancy—viz., that treason is not tied down to any particular local seat; or the ground advanced by Lewis—viz., that crimes against one State cannot be brought to judgment by any other State in whose territory they have been committed. This latter reasoning would rather prove that such acts were not amenable to the criminal law at all, if it be true that the principle of territoriality is correct.

Lastly, it needs no argument to show that in appealing to the arguments of self-defence and self-preservation, the principle of territoriality is abandoned.

According to the principles here laid down, no weight can be laid on the circumstance that the injured party is a native or a foreigner as affecting the culpability of a subject who has committed a crime abroad. Criminal law does not, in our view, spring from any protective principle, but from a reaction of the State against the guilty will, which is present in the one case as much as in the other.<sup>17</sup>

The result of this consideration seems in practice unimportant.<sup>18</sup>

<sup>16</sup> The Act of 35 Hen. VIII. c. 2, settles this for England. See Lewis, p. 20. [See the provisions of the new German Criminal Code, quoted *supra*, note 3.]

<sup>17</sup> The character of the person injured, as a subject of the State or not, is not considered, even in crimes committed within the State (Martens, § 100; Hélie, p. 49). In relation to literary and artistic property, see *supra*, § 88, in treating of the law of obligations. The exception is only apparent.

<sup>18</sup> Ortolan (No. 898) remarks: "What matters it whether the murderer, the fire-raiser, the thief, or the cheat, who lives in my neighbourhood, has murdered, robbed, or cheated a Frenchman or a Belgian in Brussels, or has set fire to the house of an Italian or a Frenchman? I, and everybody else have as much ground in the one case as in the other for procuring the punishment of the guilty, and in both cases have just the same interest in it." Cf., too, the decision of the English Central Criminal Court reported in Lewis, p. 23, *Reg. v. Azzopard*.

In the case of many crimes (*e.g.*, blasphemy or incest), no private person can be pointed out as an injured party, and, as is not disputed, it does not in any way constitute the essence of a crime,—although it may be necessary for the realisation of many different crimes,—that any special legal right should suffer.

But as regards the right of the State to punish foreigners,<sup>19</sup> who may commit in a foreign country acts prejudicial to the State or its subjects, it is to be remembered that foreigners are not bound to pay any heed to the ways and means which our State takes to attain the aim of its being ; indeed, it may be that, as is the case in uncivilised States, they have views diametrically opposed to ours as to the means by which the individual may be perfectly developed within the State. If we propose to compel foreigners to respect our laws in their own country, this is simply to declare that the regulations by which we attain the final end of our State are the only justifiable regulations, and to extend the territory of the State beyond its bounds.<sup>20</sup>

To this we must add that there is no obligation on a foreign State to suffer the presence of our subjects within its territory, and even if there were a complete obligation of such a kind, it could only be pressed against the State itself by means of public law, not against its individual subjects by means of criminal law. The foreign State has to fix under what conditions it will suffer the presence of our subjects within its territory, and what rules it will prescribe for the intercourse of its permanent or temporary subjects with our subjects.<sup>21</sup>

As regards the case of an act that is prejudicial to a private person who belongs to our State, there cannot even be any considerations of expediency urged for the extension of the criminal law in such a case. Every civilised State punishes common crimes without caring whether they have been committed upon a foreigner or a native subject. The

<sup>19</sup> Bauer, § 40 ; Henke, i. p. 604 ; Feuerbach, § 31 ; Heffter, *Strafr.* § 26, note 4 ; Leonhardt, *Comm. i.* p. 67.

<sup>20</sup> The defence of the opposite theory attempted by Hélie (p. 591)—viz., “That undoubtedly the criminal is not subject to our laws, but it must be presumed from his conduct that he has consented to be tried by them,” does in reality merely imply a disguised admission of our theory.

<sup>21</sup> Cf., too, the decisions of the English courts reported by Lewis, p. 22.



Prussian Code, therefore, rightly renounces all claim to punish crimes committed by foreigners upon Prussian subjects ; in the " motives " it gives the reason just mentioned—viz., that the conception of crimes committed against a person is very indefinite.<sup>22</sup>

On the other hand, it seems all the more necessary to insist upon the punishment of crimes against the State committed by foreigners in a foreign country, as most States either do not punish at all the crimes that are committed against other States, or at least visit them with a much lighter penalty than is imposed upon the like crimes committed against their own State. The codes of the continent of Europe extend the provisions of their criminal law which deal with offences against the State to the acts of foreigners in a foreign country, except, of course, in cases where the foreigner, in doing what he did, has discharged a duty to his country which international law must recognise ; some codes do so with reference to all possible crimes against the State, others limit it to certain specified crimes.<sup>23</sup> It does not

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<sup>22</sup> Beseler, Comm. p. 46. It is at the same time to be remembered that we need not allow a foreigner to remain in this country, and that the matter may be worked out by extradition or the banishment of the offender. The so called Thuringian Code, art. 2, only allows an act to go unpunished if it was not directed against that country, its sovereign, its officers, or its subjects.

<sup>23</sup> Almost all German codes belong to the first class. From what has been said in previous notes, it is obvious that some kinds of treason cannot be extended to foreigners. The Prussian Code of 1851 is a code of the second class ; § 4 : " Criminal proceedings may be taken, and punishment imposed in Prussia according to Prussian law—1st, if a foreigner has committed an offence abroad against Prussia, which is defined in this Code as an act of high treason, or treason-felony, or a coining offence ; " the Codes of Oldenburg, Anhalt Bernburg, and Waldeck agree with this. The provisions of the Prussian Code as to " landesverrath " have no application to foreigners abroad. The Code d'Instruction (cf. *supra*, § 133, note 9) is also to be added to this list. The Code of Austria, and that of Sardinia of 1839, which claim a subsidiary right to punish all crimes committed in another country, consider themselves as competent to try in the first instance certain specified crimes against the State, and the Austrian Code, departing, in the case of this crime, from the principle which it lays down for other crimes,—viz., that the rule of punishment which exists at the place of the deed shall be applied if it is more lenient,—applies its own rule of punishment exclusively (§§ 38-9). The crimes thus specially dealt with by the Austrian Code are high treason against

require any further discussion to show that in a strict legal sense this extension is not to be justified upon the principles already laid down.<sup>24</sup> But, since a right to inflict punishment may also be founded on the necessity of threatening assailants with punishment so as to avoid any such assaults in time to come,<sup>25</sup> we can, no doubt, justify an exercise of the right of self-defence, taking the shape of criminal jurisdiction, so long as there is a possibility that the State may be endangered by hostile acts of foreigners in a foreign country. But when the danger comes to an end, then the right of self-defence which has been exercised in that form must also come to an end.<sup>26</sup>

The danger, however, does not exist, at least in any sense in which it may be prevented by an exercise of criminal jurisdiction, if the foreign State, in whose territory, or by whose subjects these acts of hostility are committed, threatens them as hostile acts against a friendly State, with a punishment such as our law would pronounce sufficient for a hostile act of a similar character directed against a friendly State.

Closely considered, it is not reconcileable with a just estimate of the guilt of any attempt that a foreigner in a foreign

the Austrian State or the German Bund, and forgery of Austrian Government notes, or coining. See Fœlix, ii. p. 299, on the Code of Sardinia.

<sup>24</sup> Subjects of a hostile State, in so far as they have not, like the enemies' troops, the privileges of extra-territoriality, are temporary subjects, *subditi temporarii*, of our State, and subject, therefore, to our criminal law; they must discharge a duty to the State of their domicile, and that is recognised in international law. Cf. Prussian Code, § 70, div. 2, and the somewhat different provisions of the Bavarian Code of 1861, art. 114.

<sup>25</sup> The difference between this and a true criminal jurisdiction consists in this, that this apparent jurisdiction ceases so soon as the danger is past. So, for instance, by virtue of it the spies of the enemy may in time of war be shot, whereas, after the war is over, subjects of the enemy cannot any longer be brought to judgment for having acted as spies during the war. Cf. Heffter, p. 419.

<sup>26</sup> Berner, p. 146, lays down that the State, which does not punish the crimes of its own subjects against our State, throws us back into a state of nature which will give us a natural right to punish the offender. This may, however, be disputed. In a state of nature, if we can associate with that expression any distinct idea at all, there is no criminal law. Cf., too, Hälschuer, pp. 66-7, who holds the criminal jurisdiction we speak of as a right exercised as by delegation from the State which is properly entitled to punish.

country may make against our State, that he should be punished according to the same rules of law as would be applied if the act had been committed by one of our permanent subjects, or a person resident temporarily in our territory. It is plain that a subject of the State and a foreigner who is resident there owe different and far stronger duties to the State whose protection they enjoy than other persons who stand in no relation whatever to that State.<sup>27</sup> Equity, therefore, requires that if the State against which the attempt is made is to be allowed to exercise any criminal jurisdiction at all, no other law of punishment should be applied than that by which the hostile acts of our subjects against foreign States will be judged and punished.<sup>28</sup> The only purpose which the opposite theory can serve, by ignoring the characteristic distinction which exists between the guilt of subjects permanently or temporarily resident in a country, and that of foreigners in a foreign country, is to confuse the legal conscience as to the gravity of the crime of the former, and so to harm the State rather than to profit it. The essence of the crime of the former lies in the breach of faith; that of the latter can only be represented as putting international peace in jeopardy.<sup>29</sup>

The reasons which are urged in support of a right to punish crimes against the State, even when committed by foreign subjects in a foreign country, as being a means of self-defence, are by no means of so persuasive a character as they might at first sight seem to be. We might count with some assurance upon the improbability of a foreigner, who has been guilty of an attempt against our State, falling into our power. At the same time, a really dangerous undertaking against our State could hardly be carried on without falling within the reach of punishment in a foreign country under the category of a common-law crime. If we remember, lastly, that our subjects who join a conspiracy in a foreign country with foreigners to overturn our constitution, remain subject to our law, while hostile enterprises undertaken by

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<sup>27</sup> Other arguments will be added *infra*, § 150.

<sup>28</sup> So, too, Berner, p. 156; Hälschner, p. 67.

<sup>29</sup> Cf. *infra*, notes 32-3.

private persons in arms against our armies in an enemy's country are treated according to martial law, there seems to be hardly sufficient reason for going beyond the proper limit of the criminal jurisdiction of the State, especially since a hasty use of any such jurisdiction over foreigners in their own country<sup>30</sup> might give rise not merely to unfavourable treatment of our subjects on the part of the foreign State, but also to diplomatic complications of the most disagreeable kind.<sup>31</sup> The only adequate ground for an exception would be the special position of some State with a complicated frontier, and with provinces separated from each other by interjected parts of the territories of other States, and so easily open to be threatened from these intervening districts. Even then there would require to be this limitation, that foreigners in the foreign country should only be liable to punishment for acts which the legal principles common to

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<sup>30</sup> We must, for instance, remember that, according to the words of many codes, speeches uttered by the subject of a foreign State, who might proceed in the most loyal persuasion upon the belief that his fatherland was about to suffer a grievous wrong from another country, fall under the definition of high treason, and, according to the Code of Brunswick, as being an incitement to a foreign Government to go to war, under that of treason-felony. If we proceed upon the footing (cf. Hannov. C. G. B. art. 121, and the analysis of the Code of Brunswick in Breymann, pp. 235-36) that rules as to the international force of penal laws have no place in a statute book, and believe that we have avoided all difficulties by excluding the application of the ordinary penal law as to State offences from foreigners in all cases which are to be ruled by public law, we shall forget that in the domain of international criminal law no line can be drawn between rules of criminal law and rules of public law, and that it is just upon this point that there is a gap in the series of statutory provisions. At all events, we cannot recognise as adequate the limitation that the penal law against treason should only cease to have its application, after war has been regularly declared, to acts done by the belligerent in prosecution of the hostilities (cf. Breymann, pp. 240-41). If the principles laid down in the "motifs" of the Brunswick Code were actually to be carried into practice by all States, no person would venture publicly to advocate a declaration of war against another State, unless he was willing to run the risk of being punished by this other State, if opportunity offered, as a traitor.

<sup>31</sup> This is particularly true of Germany, in so far as the deed might be committed within the territory of the German Bund, and within any State of the kind which does not punish crimes against the Governments that make up the Bund. (On the latter point, see Häberlin, *Gundsätze des Criminalrechtes*. ii. p. 49.)

all lands pronounce to be penal offences against the State. It would be contrary to equity to give such an extension to particular rules of law which exist only in certain countries ; for a man might then be punished for doing something which the legal notions of the people among whom he lived would never have imagined to be illicit.<sup>32, 33.</sup>

*Note EE, on § 138.*

[The reason suggested in the text (p. 651) for holding the ships—*i.e.*, the merchant ships—of any State as a part of the territory, will not, however, suffice to support the extension which has been given to this fiction by various legislative provisions, treaties, and judicial decisions. For example, a merchant ship even when lying in a foreign port retains her nationality and extra-territoriality. The Merchant Shipping Act of 1854 provides that the jurisdiction of English courts shall extend to punish offences committed in any place either ashore or afloat out of Her Majesty's dominions by any master seaman or apprentice employed in any British ship (§ 267). The English courts have gone further than this, for in the case of the *Queen v. Anderson* (16th November, 1868, 1 C. C. 161), the court held that in the case of a murder committed on board a British ship by one American citizen upon another, the ship at the time

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<sup>32</sup> The Code d'Instruction, art. 6 (cf. *supra*, § 133, note 9), makes use of the cautious expression, "*Cette disposition pourra être étendue aux étrangers.*" It was intended to impose upon French ministers of law the greatest caution. Cf. the debates as to the expression in the Code given in Berner (p. 151). Treilhard and Bigot-Préameneu, especially spoke against such an extension of French statutes. The Prussian Code, too, in the same connection, uses the expression : "*Jedoch kann in Preussen bestraft werden, 1st ein Ausländer,*" &c. (See, too, the Code for Anhalt Bernburg and Waldeck). Cf. Beseler, *Comm.* p. 74.

<sup>33</sup> It seems that England does not punish crimes against the British monarchy committed [by foreigners] abroad. This seems at least to be the result of the following proposition of Blackstone (quoted by Stephen, ii. p. 337) : "Local allegiance is such as is due from an alien or stranger-born for so long a time as he continues within the king's dominions and protection ; and it ceases the instant such stranger transfers himself from the kingdom to another. Natural allegiance is perpetual, and local temporary only."

lying in the Garonne in a French port, the crime was cognisable in the English courts; the judges did not base their judgment on the Merchant Shipping Act, since that might be held to apply to British subjects only, but on the jurisdiction of the Admiralty transferred to the common-law courts by 28 Henry VIII. c. 15. There might be, it is admitted, a concurrent jurisdiction in the French courts, but this, says M. Ortolan, will not be asserted against the crews of foreign merchant vessels unless the aid of the French authority is invoked by those on board, or unless the offence committed leads to some disturbance in their port (*Diplomatie de la Mer*, bk. 2, ch. 13, pp. 267-71, 4th ed.). The law of England will visit with punishment offences committed by a foreigner on board a foreign ship, not merely if it is committed in a British port, but anywhere within one marine league of the shore upon the open sea, 41 & 42 Vict. c. 73, § 2.

The Supreme Court of Mexico, in the case of Antoni, 25th February, 1876, have determined that they will not entertain a charge of murder made against a Frenchman, his alleged victim being a Frenchman, and the offence committed on board a French ship in a Mexican port. This decision proceeds upon the terms of a treaty with France.

The principle of attributing to the ship the character of being part of the soil of the country to which it belongs, is further illustrated by a decision of the Supreme Court of Turin, on 14th April, 1880, in the case of Simili, where it was held that the court of the province on the registry of which the ship stands in Italy is the proper tribunal to take cognisance of offences committed on board of her, in place of the court either of the birth or the domicile of the accused.

The English courts, as we have seen, admit a concurrent jurisdiction in the case of ships lying in a foreign port, and, of course, in the event of such disturbance as interfered with the peace of the port, the authorities there must necessarily be invested with power to quell it. (Cf. in the United States courts, *Commonwealth v. Luckness*, 14th February, 1880, Quarter Sess. of Philadelphia.)

In the important case of the *Franconia* (Queen *v.* Keyn, 2 Ex. Div. 63, 13th November, 1876), where it was sought to try the captain of a German vessel, who had run

down an English vessel in the channel within three miles of the English coast—many lives being lost by the collision—in the criminal courts of England ; the judge before whom the case first depended sustained his jurisdiction, but on a new hearing in the Court of Crown Cases reserved, the judges of England by a majority refused to do so. Kelly, C. B., and Sir R. Phillimore were of the majority, and held that the power of a nation over the sea within three miles of its coasts is only for certain limited purposes, and that Parliament could not consistently with these principles apply English criminal law within those limits. “Liberty of navigation,” said Sir R. Phillimore, “is a fact recognised by all civilised States. An important corollary of this proposition is that the merchant vessel on the open sea is subject only to the laws of her flag—i.e., the laws of the State to which she belongs.” A large and weighty minority, however, took a different view, and the statute of 41 & 42 Vict. c. 73, passed in 1879, confers the jurisdiction for which they contended.

In the case of the Attorney-General for Hong-Kong *v.* Kwok-a-Sing, decided by the Judicial Committee of the Privy Council, on 19th June, 1873 (5 P. C. 179), the question arose under the terms of the Hong-Kong Ordinance of 1850, whether a Chinaman, who had murdered a Frenchman on board a French ship on the high seas, should be detained in custody in the English colony. The Ordinance provides that any Chinaman who has committed any offence against the laws of China may be imprisoned and surrendered to the Chinese Government. The accused in this case demanded to be set at liberty, and the Lords of the Privy Council, whose opinion was delivered by Lord-Justice Mellish, held that in so far as the charge of murder went, he was entitled to be set at liberty—in the first place, because looking to the terms of the ordinance, it was not to be presumed without evidence that the law of China would punish a Chinese subject for the murder of a foreigner in foreign territory ; and in the second place, because as the offence had been committed on board a French ship it had been committed on French territory, and the offence was therefore one committed against French municipal law. The prisoner was, however, detained upon a charge of piracy.]

## § 139.

Let us now inquire what modifications are caused by the circumstance that the act which is criminal by our law has been committed by one of our own subjects within the territory of a civilised State with which we live in international intercourse, and whose power of settling the provisions for maintaining law and order for all persons there found, and, therefore, for our own subjects also if they should be found there, we are bound to recognise.

One immediate result is, that an act sanctioned by the law of this State cannot be visited with punishment by our State, although the person committing it was one of our subjects, and the act would be open to punishment by the law of this country. The State, by permitting her subject to take his personality even temporarily into foreign territory, guarantees to him all the privileges given by the regulations of this foreign State, a proposition which is confirmed by the remark already made, the truth of which is on all sides recognised, that it does not seem right to impose punishment according to the law of the domicile of the person committing the act, if that act must be held as excused by the actual state of facts which exists at the place where it was committed, and by which it is influenced. For it must be maintained that the State in whose territory the act took place is the best and only competent judge of whether the act has a criminal character, looking to the actual circumstances of the country, its inhabitants, and their customs.<sup>1</sup> Thus, then, we may put aside the arguments advanced against the absolute obligation of a subject to the penal law of his domicile, and the law of the domicile ceases to be, as Lewis expresses it, a noose about the necks of its subjects, which hampers their free

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<sup>1</sup> Recognised in the Altenburg C. G. B. art. 2 (cf. Wächter, Sächs. Strafr. p. 133, note 6), and in the Prussian St. G. B. § 3, to which latter the Codes of Anhalt, Bernburg, and Waldeck give their adherence. Beseler's Commentary, p. 77, runs: "There must be some entirely unassailable grounds of expediency adduced to warrant any system of law being carried so far as to punish one of its subjects returning from a foreign country for acts committed in a foreign country under the shield of a regular system of law, and quite in accordance with its provisions." In my view the same result follows indirectly, unless there are any special provisions to the contrary in the case



movement in a foreign land, and ceases to be a source of conflict with the local system. According to the reasons given here for the exemption of a person from punishment in such a case, we need no further proof of the injustice of the limitation contained in some statute books, which requires, in order that a person may escape punishment, that the act shall not have been directed against the fellow-countryman of the person who does it,<sup>2</sup> and it is unnecessary to mention the practical difficulties which such a limitation would bring forth.<sup>3,4</sup>

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of legal systems which, like the Criminal Procedure Code of the Netherlands, art. 10 (cf. Berner, p. 108) provide that no criminal procedure shall take place, if a subject of their State shall have been acquitted by the courts of the State where the act was done ; for if the act is not criminal at that place, the judge would of course acquit of any such charge.

<sup>2</sup> To this effect the Hanoverian C. G. B. art. 2 ; Baden St. G. B. §§ 4-6 ; Bavarian St. G. B. of 1861, art. 10. (The Code of Baden puts the limitation in this way : if the act "was directed against a person in this country." In that are not included acts directed against natives of Baden in a foreign country, but acts directed against foreigners who happen to be in Baden are. All *subditi temporarii* are here substituted for permanent subjects). St. G. B. of Thuringia (see Wächter, Sächs. Strass. p. 132). The maxim, "*Volenti non fit injuria*"—a maxim which, by the way, has no application to criminal law—will not account for the non-criminality being determined by the law of the State where the act was done, as was assumed in the Hanoverian Diet ; for the State in whose dominions the act was done need not necessarily be the State whose subject has been injured (cf. Leonhardt, Comm. i. pp. 54-5, and Köstlin, pp. 45-6). On the other hand, the maxim, "*Volenti non fit injuria*," bears out the principle that it is this latter State that has the right of punishment, as does also the provision actually laid down in the St. G. B. of Würtemberg, art. 3, No. 1, by which the act of a native committed in Würtemberg is not to be punished, if it is directed against a foreign State, its officers or subjects, and is not liable to punishment by the law of that State.

<sup>3</sup> Cf. *supra*, § 138, note 9. *Quid juris* if for instance the law of the one country holds that a person wounded in a duel is an injured party, while that of the State to which the wounded person belongs holds that in a duel—unless there be death by treachery or other fault—there is no injured party. Wächter, pp. 132-33, proposes to exempt from this exemption offences against morals. But in a strict sense every offence is so, and the reasons of expediency assigned for the recognition of an exemption from punishment according to the law of the place where the act was done, seems to have special force in crimes that are called offences against morality.

<sup>4</sup> Any act is for the particular case exempt from punishment, if it requires the motion of some private person to bring it to justice, and no such motion is made, cf. Schwarze, p. 191.

We have only a single exception to make to the recognition of the non-criminality of an act which bears that character in the country where it was done. That exception includes all crimes directed against the sovereign rights of the home State of the person who commits them, such as high treason, treason-felony, slander against the sovereign or his Government, rioting, breach of official duty, and, lastly, coining offences and acts of the same kind as those enumerated.

This exception to the principle of territoriality, recognised in systems of law,<sup>5</sup> is, as a rule, established upon the consideration that in a foreign State such crimes are either not punished at all, or are threatened with a sentence disproportionately slight as compared with what is imposed in the case of crimes against that State itself; and some doctors go so

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<sup>5</sup> Cf. Villefort, p. 32; Code d'Instruction, art. 5. (Here the limitation provided in the 7th article for the prosecution of private offences is inapplicable, "*s'il (le Français) n'a pas été poursuivi et jugé en pays étranger.*" The Sardinian Code is formed on the model of the Code d'Instruction in this respect; cf. its 5th article, with articles 6th and 10th of the other (see Fœlix, ii. § 588). The Criminal Procedure Statute of the Netherlands of 1st October, 1838 (translated and given by Berner, p. 107), provides in its 8th article: "The Netherlander who is found guilty, actor or art and part, of any offence against the criminal law, by which, according to the express provisions of the penal code, the peace or safety of the kingdom is imperilled or disturbed, or who commits any breach of the law applicable to the coin authorised to be circulated in this kingdom, or who imitates or alters any public property, or any property created by statute, or bank notes authorised by statute, or seals, stamps, or tokens used publicly in this kingdom, shall be prosecuted and punished according to the law of the Netherlands, without regard to the law of the country where the crime was committed, and irrespectively of whether its law imposes a more or less severe penalty, or imposes no punishment at all upon the act in question." Prussian Code, § 4: "It is, however, competent to prosecute and punish in Prussia by Prussian law. . . . 2nd, Any Prussian who has been guilty of high treason or treason-felony against Prussia, or slander of the sovereign or his Government, or coining in a foreign country." The other exceptions and mitigations of punishment, provided in subsection 3rd for other offences committed by a Prussian abroad, do not apply to the cases mentioned in the 2nd subsection. Cf. § 4 of the Code for Bernburg and Waldeck. The Code for Hesse and Nassau, by article 5th, punishes foreigners who have been guilty of the following crimes in a foreign country, if they shall come to Hesse or Nassau: High treason, treason-felony, slander of the sovereign or his Government, rioting, flooding, forgery of public stamps or seals, or stamp papers, or imitation of money or notes circulating in the country or used in its trade.

far as to ask<sup>6</sup> that every State should be bound to punish such crimes, when directed at a foreign State, as severely as if directed against itself. If we admit the truth of the principles already laid down as to the binding force of the law of the domicile, we do not stand in need of any such justification as this, which merely leads back to the idea of self-defence. For although our State may entrust the conduct of its subjects in a foreign country, even in their relations with their own countrymen, to the regulations for order provided by the State where they happen to be, we cannot assume the same to be true in the case of crimes by which any peculiar right of a State, its dignity or its existence, is threatened: it would be contradictory to the highest duty of the State, the duty of self-respect and self-support, to make the punishment of crimes of this kind, committed by its own subjects, dependent on the value which any foreign Government may attach to the rights of another State.<sup>7, 8, 9</sup>

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<sup>6</sup> Köstlin, p. 44; Witte, pp. 49, 60. From the theory which speaks of a right of exercising criminal authority by delegation from that foreign State in whose territory the act was done, important results, to be noted below, § 143, arise.

<sup>7</sup> As to another argument, on which Marezoll and Hälschuer specially rely, see *supra*, § 132 *ad fin.*

<sup>8</sup> If a subject is compelled by a foreign State, in whose territory he happens to be, to do an act against his own country, he is, of course, excused, unless he has culpably brought himself into that position. The "motif" of the Code of Brunswick, §§ 84-5, explains upon this head very properly (Breymann, p. 241), that there may also be cases in which subjects who carry arms against their own country will not be considered as traitors. In many cases—*e.g.*, in Austria—it is admitted as a principle that foreigners who enter upon active military service do not thereby become subjects, and do not lose their original allegiance. If, then, such persons, while in that service, continue in it after a declaration of war, they could not be punished as traitors without a formal proclamation being first issued to them. I should take this view, that even in that case, if it was not open to the subject to leave this foreign service, and if, at the same time, he had entered it with the approval of his own country, he would be exempt from all punishment. If a State gives its approval to his entry upon foreign service, it cannot call him to account for the conflicts arising out of that circumstance. This is the result of the principles already laid down (§ 30), which determined that where a person enters into a foreign service, the reservation of his previous allegiance has only a latent import. The 111th Article of the Bavarian St. G. B. of 1861, provides: "A Bavarian who takes service in a foreign army after war has been levied by it upon Bavaria, shall be punished with death. The same punish-

As for the view that every State must punish treasonable practices against another State, just as if they had been used

ment shall be inflicted on a foreigner in the service of Bavaria who does so, unless the foreign army be the army of his own native country. If, at the outbreak of war against Bavaria, a Bavarian is already serving in the army of the hostile State, and remains in it voluntarily, he may be punished with imprisonment." Here the first tie of allegiance is held (against our view) to be the stronger, and entitled to prevail. It may be remarked in passing, that, since force used by a foreign State releases its object from criminal responsibility, it cannot be accounted treasonable if, during an enemy's occupation, a subject shall give obedience to his regular requisitions and regulations. Cf. Häberlin, ii. p. 40.

<sup>9</sup> No general definition can be given of the crimes that have the peculiarity of being offences against the sovereign rights of the State, its dignity and existence; that must be left to the spirit of the particular system of law, if it does not, like the Prussian Code, expressly and specially enumerate them; this inquiry will in practice lead to much doubt and difficulty. At the same time, if the rule, that in doubt the interpretation must be in favour of the accused, is observed, it is possible to work it out, and according to the provisions of some laws is not necessary; for instance, by the Criminal Code of Hanover, the punishment of foreigners for crimes committed by them abroad is excluded if the act, although it may have been directed against the kingdom of Hanover, is not subject to punishment by the law of the place where it was done. For although indirectly every crime may be viewed as an invasion of the rights of the State (cf. especially Dollmann in Blüntschi's Staatswörterbuch, i. p. 512), and crimes of any kind, if they are committed daily and hourly with impunity, must in the long run endanger the very existence and the proper rights of the State; yet there is a broad distinction marking out that class of crimes which, even if but once committed, would have this result. These are not what we term political crimes, but trespasses upon the exclusive rights of the State, especially upon the privilege of making and bringing into circulation coin or notes (cf. Leonhardt, *Comm.* i. p. 71). If by special Government license, private persons or corporations have the right of issuing notes of credit, or notes payable to bearer, this seems to be an authority derived from the right which the State enjoys, and the forgery of such notes seems to be a crime against the State. Cf., *e.g.*, Prussian St. G. B. 2, 121-24; Code d'Instruction, art. 5. There is, however, nothing to prevent an offence against the proper privileges of the State being at the same time an offence against some other legal right,—as, for instance, the crime of coining implies at the same time an offence against honesty and good faith in trade; on this account some systems of law punish coining offences committed within their territory, not merely if they refer to their own coinage, but even although they refer to foreign coins circulating there, and frequently with precisely the same punishment, while some systems do not even require that the money should have a circulation there. Cf., *e.g.*, the C. G. B. of Hannover, art. 200; Brunswick C. G. B. art. 126; Russian St. G. B. § 121. A special definition of the crimes that fall under this head is, however, always to be preferred—

against itself, it is almost universally acknowledged that such an extension is by no means obviously right,<sup>10</sup>—a view justified, too, by history, as Zacharia points out.

In the days of Roman law it was only a person who was found guilty of a crime against the people of Rome, the republic, or in later times the *princeps* who was said to commit the crime of *majestas*. Foreign States are only mentioned as being capable of being incited to hostility against the Roman republic.<sup>11</sup> The particular rules of older Germanic public law exhibit a like limitation of the corresponding kind of crime to the native State:<sup>12</sup> the law of the German empire knew no treason save against the emperor and the empire, which any subject or adherent of the emperor might commit; just as in later times treason of a different kind, against any supreme lord, was recognised, and this could only be committed by his own adherents. A modification of this was introduced as early as the days of the golden bull, which made this crime of treason possible in the case of any of the electors as being constituent parts of the empire.

But we shall be all the less inclined to allow any system of law to make such a demand,<sup>13</sup> for the very reason that, so

as, for instance, was done in the case of the Prussian St. G. B., on the motion of the committee of the Chambers. Cf. Beseler, pp. 75-6. The crime of forging or falsifying public records does not fall under this head; in this category there is no doubt that the main consideration is the offence done to the honesty and good faith of public intercourse. (Cf., too, Prussian St. G. B. § 4; Oldenburg St. G. B. art. 3.) The Codes for Prussia (Anhalt, Bernburg, Waldeck), §§ 251-52, and Oldenburg, art. 224, § 1b, put the forgery of foreign and native public records on the same footing. Other Codes—*e.g.*, that of Thuringia, art. 252—speak of public records without making this distinction; cf., too, C. G. B. of Hanover, art. 196.

<sup>10</sup> Henke, i. § 90; Heffter, § 26, note 3; Zacharia, Archiv. d. C. R. 1852, p. 48.

<sup>11</sup> L. 4, D. ad Leg. Jul. Maj. 48-4.

<sup>12</sup> See the citations in Zacharia, p. 42, note 6.

<sup>13</sup> This demand is made by Köstlin, p. 44. Witte, too (pp. 52-3), describes it as primarily correct. The "motif" of the Criminal Code of Brunswick speaks in the same terms (Breymann, pp. 241-42). The Criminal Code of Würtemberg declares its provisions as to high treason applicable generally to acts against foreign States,—of course under the conditions required in other cases for giving competent jurisdiction to the criminal law and courts of Würtemberg. One condition which is attached to this provision—viz.,

various are the institutions of different countries, a direct application of the criminal law of one to acts directed against the political institutions of another would in many cases transgress the principles of equity. If we remember at the same time that it will often be necessary incidentally to give a decision as to the legal validity of political institutions existing in another State in the course of the process that such acts will originate,<sup>14</sup> we shall certainly say that the proper course will be to put out of sight any direct application of penal laws referring to crimes against the native State to acts which are directed against a foreign State. On the other hand, there can be no question that a State is entitled to threaten with punishment hostile acts against friendly States, for the simple reason that they are calculated to disturb the peaceful international relations of the native State.

Such rules correspond far more closely on the one side with justice, since the view that subjects have the same duties to foreign States as to their own is untenable, and on the other side they are as a rule more easily put into practical operation, than the laws as to crimes against the native State could be. While it is necessary for this latter course that a judgment should be arrived at, pronouncing the foreign Government which is threatened by the act to be in the right, all that is required for the punishment of an act of hostility against a friendly Government is that the Government so threatened should be recognised by us. We dismiss any such dangerous inquiry, and the authorities of the one State may refrain, in accordance with the principle of non-intervention, from any judgment upon the political condition of the other. Although, then, it is obvious that acts of hostility against a friendly State must on the one hand be far more leniently punished than acts of the same kind against the native State, and, on the other hand, the circle of acts that may be visited with punishment as being perilous to international peace, must

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reciprocity, will go far to make it worthless. The Hessian St. G. B. art. 139, confines equality of punishment to the case of crimes directed against other German States.

<sup>14</sup> Cf. *infra*, § 150. The same reasons that make against the extradition of political offenders, are all the more important here, where there is a question of direct punishment, instead of a question of assisting foreign justice.

be far narrower<sup>15</sup> than the circle of acts of offence against the native State, which are directly liable to punishment, yet the removal of such a doubtful inquiry will do more to preserve the security and the peace of friendly States than could possibly be achieved by means of the cosmopolitan theory.<sup>16</sup>

At the same time, it must not be overlooked that special statutory provisions may be made<sup>17</sup> by virtue of which acts against a foreign State may be treated in the same or a closely similar fashion as regards punishment as that in which attacks upon our own State are treated; this seems competent if the two States stand in a close and permanent connection,<sup>18</sup> and if at the same time the political institu-

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<sup>15</sup> Most systems of law punish attempts upon friendly States merely as acts dangerous to the State, but not as high treason, although there is frequently insufficient attention paid to the reasons adduced in the text.

<sup>16</sup> If a State allows a foreign official to act within its territory, he represents the native officials in exercising real powers of compulsion under that authority—*e.g.*, in transporting or imprisoning criminals. A crime against such an official is therefore in a legal sense a crime against the State where he is, and must be punished just exactly as a crime against one of its own officials would be punished. In this way we can dispose of the difficulties raised by Arnold (*Gerichtsaal*, 1857, pp. 324-25) against our theory. The C. G. B. of Hanover contains, too, this provision: "Any injury to the reputation of a foreign official who is in charge of some official duty in this country, with the knowledge and approval of this Government, will be tried and punished like a slander against native officials, if the position of the foreigner was publicly known, or was in the knowledge of the slanderer."

<sup>17</sup> Apart from special legislative provision it cannot be said that any attack upon the constitution of one of several federated States implies an attack upon the federation or the other members of it (*cf.* Zacharia).

<sup>18</sup> Temporary alliances cannot be reckoned under this head. In my view it is not fitting, from the point of view that in the criminal act there lies a danger to the peace of nations, to limit the application of punishment to acts against federated States (*cf.*, *e.g.*, C. G. C. of Hanover, art. 128, 4). The Prussian Code, § 78, speaks of acts against one of the German States or its ruler, but adds in the concluding sentence: "The same punishment is imposed if the act is directed against another State, in which reciprocity is guaranteed by published treaties or by statute." The Bavarian Code of 1861 only sanctions the infliction of punishment upon the motion of the foreign government concerned, for the perpetration of an act against it or its sovereign by a Bavarian, or by a foreigner residing in Bavaria or in the Bavarian service, which if committed against the King of Bavaria or the State of Bavaria would be high treason, and if that Government does not belong to the German Bund it only sanctions it under the further condition that the existence of reciprocity between the States is admitted by a declaration of the Bavarian

tions of both admit such a course—an exceptional case, of which use can only be made with the greatest caution, looking to the reasons adduced above.<sup>19</sup>

It needs no further exposition to show that by means of the extension of the laws of the country of the domicile in the way suggested, the sovereign rights of the foreign State in whose territory the acts in question were committed cannot in any way be injured: a conflict with the foreign legislature will be entirely avoided.<sup>20</sup>

Lewis,<sup>21</sup> lastly, advances against the competency of the courts of the domicile to try acts committed in a foreign country this consideration, that on the one side, as a matter

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Government published in the form of a decree. But, on the other hand, it must be recognised that the severe punishments of the German Codes are only adopted for States that are really in one federation, and do not harmonise with the principle adopted by the Brunswick Diet, which holds that under the expression allied sovereigns and States, which their Code uses, we must include not merely those with whom the duchy stands in a defensive and offensive alliance, but all those foreign States and Governments with which it has any diplomatic relations. (The Criminal Code of Saxony comprehends under the expression so used in it, all that the code of Brunswick does. Wächter, Criminal Law of Saxony, p. 153.) The proper course seems to be to punish crimes against States which are truly and permanently in confederation or alliance more severely than crimes against States with which we are merely friendly. The idea at the bottom of the Code of Brunswick is therefore too comprehensive. The moderate view perhaps is that indicated by the Prussian Code, which requires an assurance of reciprocity. (Whether a State belongs to the category of confederate or friendly States must be decided independently by the judge, although he may inform himself as to the actual relations by application to the ministry of foreign affairs. Wächter, p. 153, note 9.) [By the German Criminal Code of 1871, crimes against any of the States composing the empire are put upon the same footing as crimes against the State itself, and the empire will punish her own subjects or foreigners within her bounds for crimes against foreign States, if these foreign States will reciprocate these good offices.]

<sup>19</sup> If the crime has been committed by natives of this country abroad against foreign officials, it will be punished in precisely the same way in this country as if it had been directed against native officials of the same category (cf. a judgment of the Supreme Court at Berlin, 16th May, 1855). But a judgment of the Court of Cassation at Darmstadt, of 25th July, 1849, expresses an opposite view.

<sup>20</sup> Cf. Hélie, p. 584. Of course, direct procedure against persons resident in foreign territory is out of the question. We speak only of the punishment of persons who have returned or have been given up under extradition.

<sup>21</sup> Pp. 30 *et. seq.*



of fact, very little use will be made of this privilege, and on the other that, if a frequent use is made of it, it may frequently lead to the prosecution of innocent persons, since as a rule evidence adequate to convict is only to be obtained at the place where the act was committed ; and, therefore, he says that the possible benefit is quite disproportionate to the harm that may be expected.

As regards the first point, it may be conceded that there will be fewer opportunities in England, by reason of its geographical position, than in the States of the Continent for punishing crimes committed by her subjects in a foreign country. But in other countries—*e.g.*, the States of the German Bund—a very frequent use will be made of this competency of the native courts, and French jurists have felt most keenly the evils of the limitations imposed by their legislature upon the right to punish crimes committed by Frenchmen abroad. The fact that only a small number of crimes committed abroad have come for judgment before the courts of England, is at the same time entitled to all the less weight, because England punishes only some kinds of crimes when committed by British subjects abroad.

The second objection I am also disposed to pronounce unfounded. No doubt it has been already urged by us that to extend the jurisdiction of the courts of one country over all crimes committed even by foreigners in a foreign country would be apt to lead to the prosecution and punishment of innocent persons. But in the case of the prosecution and punishment of natives the case is otherwise. Although in most cases the evidence is at the place where the act was done, still there are very important matters of evidence—such as previous character and history, and the personal circumstances of the accused—which are specially at the command of the court of the domicile. The accused from his knowledge of the language, of the persons, and of the legal procedure of his own country, will as a rule find his defence the easier ; in the Middle Ages the right to appear and answer in the court of the domicile was sought and maintained as a special privilege. To this we must add, that the foreign State will have no reason in such a case, as it would have in the case of the punishment of foreigners by us, to refuse

its assistance in furnishing evidence. If we had no right to punish crimes committed by our subjects abroad, we should have to choose between letting a guilty person go unpunished and giving him up; the latter course would simply serve to oppress the accused.

Besides, to punish the criminal at his domicile presents peculiar advantages which are not to be attained by means of the principle of territoriality, or even by extradition. The existence of the criminal is a fixed thing, but the place of the act may not be so.<sup>22</sup> In this case the principle of territoriality would let the accused go free. The risk of these and similar uncertainties and doubts is removed by<sup>23</sup> the principle we have adopted.

The principles already laid down (§§ 30-1), determine whether a person is to be held as a subject or adherent of a State. This question, as these principles determine, in so far as it has to do with establishing the jurisdiction of the criminal courts of the domicile, or the application of the criminal law of one country or another, belongs to the competency of the courts; which will, however, if the decision of the competent administrative officials is given before the act in question is committed, have to respect that decision as creating the law applicable to the case, if the person in question has, before he did the act, expressed himself satisfied with the decision of the administrative officials.<sup>24</sup>

Lastly, we have to note, that according to the principles already laid down for establishing the jurisdiction of the native criminal courts, the person must have been one of their subjects before he did the criminal act, otherwise we should have to ascribe a retro-active effect to the admission into the citizenship of the State.<sup>25, 26</sup>

<sup>22</sup> *E.g.*, a servant goes on stealing from his master during a journey.

<sup>23</sup> In France, for instance, it is keenly disputed where the place of the criminal act is if a man becomes bankrupt in France, but has committed fraudulent acts against his creditors in another country, cf. Villefort, p. 15.

<sup>24</sup> Cf. Wächter, *Sachs. Strafr.* p. 132, note 4.

<sup>25</sup> Cf. Wächter, p. 137, note 15.

<sup>26</sup> To require, as Hélie proposes (p. 622; see also Code d'Instr. art. 7, *supra*, § 133, note 9), that the injured party should demand that the act committed abroad be punished, cannot primarily be admitted to be just, since the punish-

## WHAT CRIMINAL LAW IS TO BE APPLIED ?

## § 140.

Since a subject is punished for crimes committed by him in a foreign country, because he has been guilty of a breach of the law and order of his own country, the law of his own country can alone determine the penalty to be imposed, and regard can only be had to the law recognised at the place where the act was done, for the purpose of showing from the far more lenient rules of punishment there in use that the law takes a different view of the matter,—a fact which may serve to excuse our subject, who may have adopted that view.

The application of our own law cannot result in any injustice, for our subjects are acquainted with the principles of law which lie at the root of our legislation, and carry that knowledge with them.

To punish in every case according to the law of the place where the act was done, would imply an intolerable outrage upon the legal conscience of the State inflicting the punishment,<sup>1</sup> in cases where these laws impose a more severe penalty than the law of the criminal's own country ; in other cases, if his native law did not recognise at all the kind of punishment imposed by the laws of the other country, the matter could not be worked out, and in every case would be attended with the greatest difficulties.<sup>2</sup> The view which at the present day prevails completely accords, in so far as the punishment of subjects is concerned, with that which we have submitted.<sup>3</sup>

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ment of these offences takes place in the public interest. At the same time, there is much to be said for it in practice. This limitation is unknown to the German Codes, at least in so far as the punishment of actual crimes is concerned ; see, however, *supra*, § 139, note 18.

<sup>1</sup> Cf. Köstlin, p. 29 ; A. M. Klüber, § 63.

<sup>2</sup> Cf. *supra*, § 132 ; and Berner, p. 162.

<sup>3</sup> See Heffter, *Strafr.* § 150 ; Berner, pp. 162-63 : Hälschner, p. 64 ; Schwarze, p. 195 ; Hélie, p. 592 ; Gross, *im Archiv. d. C. R.* 1853 ; *Ergänzungsheft*, pp. 73-5, *Code d'Instr.* arts. 5-7 ; Belgian Law of 30th December, 1836, art. i. (cf. Fœlix, ii. § 556) ; Sardinian G. B. arts. 5, 6 ; Hanoverian C. G. B. art. 2 ; Brunswick C. G. B. § 2 ; Prussian St. G. B. § 4 (cf. Beseler, *Comm.* p. 74) ; Royal Saxon St. G. B. arts. 2-3 (cf. Wächter, on *Sächs. Strafr.* pp. 142-43) ; Hessian Law of 23rd February, 1849 ; Austrian St. G. B.

It may be said that, by deduction from the rule that an act which is not criminal abroad must go unpunished by us also, punishments should be in conformity with any more lenient rule prevailing abroad ;<sup>4</sup> for a more lenient punishment is simply partial immunity from punishment. But, if the State is to punish at all, it can only impose what seems to it a just punishment,<sup>5</sup> and if we are to go back upon considerations of equity, it is to be noted, as was said during the revision of the Draft of the Prussian Code, that there is so far a real distinction between the two cases, that a person who does what is entirely beyond the reach of punishment at the place where he does it, believes himself quite secure, but a person who does what is in itself open to punishment, has the consciousness of doing wrong ; but in law we can hardly take into account the expectation of being punished severely or leniently.<sup>6</sup>

Equity, however, irresistibly requires that regard should be paid to a milder form of punishment recognised at the place of the deed in cases where a foreigner is punished for crimes committed in a foreign country ;<sup>7</sup> for he has no opportunity of

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§ 36 ; Thuringian St. G. B. art 2 (cf. Wächter, pp. 147, 137) ; Bavarian Penal Procedure Regulations, art. 30 ; Bavarian St. G. B. of 1861, arts. 10-12. So, too, the practice in Hesse (Heuser, Decisions of the Criminal Senate of the Supreme Court of Appeal at Cassel, i. p. 711).

<sup>4</sup> This is Köstlin's view. Cf., too, Pütter, § 24 ; Arnold, in the *Gerichtssaal* of 1857, pp. 327-32, proposes to punish according to the laws of this country, if the crime was committed upon our subjects abroad ; but if it was committed by our subjects abroad and upon foreigners, to apply the law recognised at the place of the deed if that is the more lenient. Cf. Bauer, *Strafr.* § 40.

<sup>5</sup> Cf., especially, Gross' remarks.

<sup>6</sup> Berner, p. 164.

<sup>7</sup> This rule is recognised in many systems—*e.g.*, in the C. G. B. of Hanover, art. 3 ; the Austrian G. B. § 39—with regard to crimes committed abroad upon private persons. According to the Code of Brunswick, art. 2, and the new Bavarian St. G. B. arts. 10-12, none but their own laws are to be applied. The reason given for that (cf. Breymann, p. 159), that the foreigner cannot complain if the State which sets him before its courts treats him as one of its own subjects, cannot be held to be appropriate, since the foreigner was not in the same position as a subject at the time the deed was done, and that is the only point at issue. The older view was rather that of Köstlin. On the practice in Brunswick and Saxony before the publication of the New Codes, see Breymann and Wächter. *Sächs. Strafr.* p. 142, note 3 ; so, too, P. Voet, *De statutis*, xi. c. 1, note 5.

becoming acquainted with our laws and our theories of right, and frequently does not know to what State the person whom he has injured belongs. The analogy of the generally admitted principle that the foreigner, the moment he sets foot on our soil, is subject to our penal laws, cannot be employed in this case against us,<sup>8</sup> without taking into account whether he has made himself acquainted with them; for between the two cases there is this important difference, that one who enters a foreign country cannot but know that he is subject to another law, and, if he is uncertain whether a particular act will be permitted, he has opportunity to inform himself.

But, on the other side, again, it must be remembered what a strong impression it must make if foreigners are to enjoy the privilege of a more lenient punishment in questions with natives.

In short, the difficulties and the considerations that have emerged upon this point show that it is inconsistent with the first principles of criminal law and of public law, to extend the penal laws of one country so as to punish the acts of foreigners in a foreign country, at least in so far as there is no question of a crime against the State.

#### IV. PARTICULAR PROBLEMS—PUNISHMENT OF POLICE OFFENCES AND MINOR OFFENCES COMMITTED ABROAD.

##### § 141.

It is laid down by most authorities that trifling contraventions of the penal law can only be punished in the country in which they were committed, and that therefore there can be no punishment here of police offences committed by our subjects in another country. The reason is that, on the one hand, we have to deal with provisions which have a purely local import;<sup>1</sup> and, on the other, it is of no importance for

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<sup>8</sup> See, too, Ortolan, No. 903.

<sup>1</sup> Berner, pp. 126-27. The usury limitations of the place where the capital is to be invested must rule (cf. *supra*, Law of Obligations, § 71). This is overlooked in the judgment given by Temme, Archiv. i. p. 32, of the Supreme Court of Appeal at Cassel, 18th July, 1849, which condemned a Hessian subject because he had taken from a foreigner a commission for procuring him a loan, an act forbidden by the law of Hesse. If the court's view was sound,

the maintenance of law and order in general that such petty infringements of the law should be brought to justice, while the expenditure of trouble and money necessary to investigate and punish such crimes would be out of all proportion to the advantages it could bring.<sup>2</sup>

From these reasons, which are not, however, of an absolute kind, it follows at the same time that, under certain circumstances—on account, for instance, of the special condition of the frontiers of the States in question—exceptions may be allowable or even necessary;<sup>3</sup> that will be so whenever such an extended influence must be given to the criminal law of any country, in order to maintain the local police ordinances and domestic order and law.

The Legislatures of Germany, moreover, punish both grave and trifling criminal offences committed abroad,<sup>4</sup> those of France the former only (*Crimes*). Almost all French jurists have recognised that their limitation leaves far too large a number of criminals free from punishment.<sup>5</sup> We cannot but think, however, that if the punishment of some act done in a distant country is in question, the German Legislatures go too far, and that a different rule, varying according to the distance of the other country, is the proper rule to adopt here. We should in that way prescribe the punishment of simple police offences committed in the adjoining districts of a State that is contiguous to our own, the punishment of grave and trifling crimes in other countries, and in countries at a great distance the punishment of the gravest crimes only.<sup>6</sup>

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all persons who receive from foreign securities a higher rate of interest than their own law allows, must suffer as usurers. Cf., on the other hand, Wächter, Sächs. Strafr. p. 161.

<sup>2</sup> Mohl, p. 722.

<sup>3</sup> This is specially applicable to the States of the German Bund. Cf. the Police Code of Hanover of 1847, § 5.

<sup>4</sup> Cf. the Hanoverian C. G. B. arts. 2-3; Prussian St. G. B. § 4.

<sup>5</sup> Cf. Villefort, p. 26.

<sup>6</sup> See particularly Lewis, p. 32, on the consequences necessarily due to the geographical position of different countries. In Germany, for instance, by virtue of special agreements made between the different Governments, in many instances poaching committed on the frontier of the other State is punished. The Police Code of Hanover, § 3, rule 1, provides: "Police offences committed by our subjects abroad are to be punished according to

In my view punishment is excluded<sup>7</sup> if the act in question is a mere police offence by the law of the place where it was committed, while by our law it is a crime; and that on the same grounds on which it was maintained that immunity from punishment by the law of the place of the deed must be respected. For a criminal prosecution it is necessary that neither of the systems of law which are concerned in the particular question shall confine the effect of the act to the limits of its own country.

PLACE OF THE ACT AND PLACE OF ITS OPERATION—ATTEMPTED  
CRIMES—CONTINUOUS CRIMES—ART AND PART.

§ 142.

From the facts that constitute any particular crime there may be permanent external results, and it may be that these results will take place in some territory other than that in which the acts that gave rise to them happened. It was a subject much debated among the older authorities on criminal law, in which territory the crime was in such a case committed. Most of them come to the conclusion that it was committed in both, and should be punished in both.<sup>1</sup> It is, however, more correct to regard the place of the principal act as the *forum delicti commissi*,<sup>2</sup> as John Voet does.<sup>3</sup>

this Code, if an appeal shall be made to it by the competent official of the foreign country, or by the injured party." The Prussian Criminal Code, § 4, runs thus: "Contraventions committed abroad shall not be punished in Prussia, unless that is required by special laws or treaties."

<sup>7</sup> The Supreme Court at Berlin, in a judgment of 14th Dec. 1864, has pronounced for the opposite view. Temme, Archiv. iii. p. 2. But see, on the other hand, Temme, note 1.

<sup>1</sup> Cf. Jul. Clarus, Sentent. v. S. fin. qu. 32, n. 9; Farinacius, L. 1, titul. 1, qu. 7, § 44; P. Voet, xi. c. 1, n. 8. Ortolan also takes this view, Nos. 951-52; Pütter, § 98.

<sup>2</sup> So, too, Witte, pp. 48-9. Cf., too, Hélie, p. 499; the judgment of the Court of Cassation at Paris of 22nd Jan. 1826, reported there, p. 500, recognises the jurisdiction of the French Courts to punish the publisher in France of a public slander upon a foreign subject. So, too, the Supreme Court of Appeal at Munich and the Supreme Court at Mannheim have laid down that the *forum delicti commissi* is constituted at the place where a slanderous letter is posted, and not at the place where it reaches the person to whom it is addressed. (Cf. Temme, Archiv. ii. p. 239; iv. p. 332) [cf. p. 682].

<sup>3</sup> Comment. in Dig. xlviii. 19, n. 11.

For, on the one hand, penal laws are rules for the conduct of mankind, and not means for preventing the occurrence of any facts ; and, on the other hand, according to the opposite view,<sup>4</sup> the criminality of the actor, and the competent *forum*, would often be left to the pleasure of the injured person. Punishment must, however, be excluded, if by the law of the place where the consequences of the principal act took place according to the intention of all parties, these consequences were held lawful.<sup>5</sup>

The opposite view would be justified upon the principle that the criminal law rests upon the right of the State to protect a particular person or thing. It would logically lead to this, that the competent criminal authority of every State would have to inquire in whose territory the act might have wrought any mischief, an inquiry which, in many cases—*e.g.*, in cases of defamation—could not be answered.

Many acts are punishable only because the criminal, before

<sup>4</sup> This is the view taken in the judgments of the Supreme Court at Berlin, reported by Temme (i. p. 325 ; v. p. 119), and is approved by Hälschner, p. 73, since it is not the act itself that contravenes the law and merits punishment, but it is the cause of consequences which infringe the law. But the consequences in themselves are never offences against the law ; they become so through the guilt of the person who did the act. See, on the other hand, Temme, Arch. i. p. 326, note, and the decision of the Supreme Court at Zürich, reported by Temme, Arch. vi. p. 54, which, proceeding on our view, found that the courts at Zürich were incompetent to try a foreigner criminally for defamation contained in a letter to a person living there.

<sup>5</sup> To this effect judgments of the Supreme Court at Berlin, 25th April and 9th Oct. 1856 (Goltdammer, Archiv. für Preussisches Strafr. iv. pp. 572, 835). In both cases the court required proof that the act was punishable in the foreign country where it was committed. On the other hand, another judgment of the same court of 31st May, 1856, properly notes (Goltdammer, iv. p. 831), with regard to a case in which the accused had fraudulently insured the life of a third party with the agent of a London insurance company resident in Berlin, and where the contract had been completed in London, by the issue of the policy there : "In saying that the contract of insurance effected by fraud was completed in London, it does not follow that the crime laid to the charge of the prisoners is to be held as committed in a foreign country, but rather, since all the acts that go to make up the crime were done in this country, and, in particular, the payment of the premiums was made here, and the final act by which the patrimonial wrong, constituting the crime, was done in Prussia, it was the rule of our criminal law, which imposes penalties upon fraud to the prejudice of foreigners, that was transgressed."



committing them, entered upon some special legal relation that set him under an obligation ; for instance, a marriage is only bigamous, and so criminal, if the person contracting it has already contracted another which is undissolved. The first marriage, in this case, supplies the actual conditions of fact which make the crime possible ; the place in which the condition had its operation, cannot be regarded as the *locus delicti commissi*.<sup>6</sup>

The opposite theory could only punish embezzlement if the articles misappropriated had been entrusted to the criminal within the territory of the State.

The jurisdiction competent for crimes is, moreover, established in that country where the criminal act is attempted,<sup>7</sup> and the criminality thereof is aggravated by reference to the act which sooner or later may be committed in another territory in pursuit of this attempt ; for it is this which alone can give us an actual factor for judging of the criminal intent, which is one with the act. The judge of the State in whose territory the attempt is made has, therefore, to punish the completed crime, although the final act belonged to another territory, in so far as the two acts stand in a con-

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<sup>6</sup> Cf. the judicial determination given in Villefort, p. 22, and Böhmer, § 24.

<sup>7</sup> Cf. Hessian Code, art. 3: "Criminal acts begun beyond the territory of Hesse, but finished there, or begun here and finished abroad, must be regarded as if they had been both begun and finished here." The Codes of Nassau, art. 3 ; Anhalt-Dessau and Köthen, art. 2 *ad fin* ; and Breidenbach, pp. 225-26, remark : "The crime will, as a rule, only be competent in a foreign country if the criminal withdraws himself by flight from the jurisdiction of the courts of his own country. If we proposed to adopt the principle of extradition, the question would be, what should be the result if the foreigner began in this country and completed in his own an act which his law pronounced innocent, but our law criminal?" (In my opinion, in pursuance of what was said in note 4, we should certainly be obliged to pronounce that the act was innocent in our country also, if it was the full intention of the person who did the act, at the moment when he began it, that it should be completed abroad). For it would be a satire on justice to punish merely for an attempt when the crime had been completed. If the act was threatened with punishment by our law, our judge would be just as little entitled to punish the attempt, and then give up the criminal ; for that would mean that a murderer, for instance, would have to undergo imprisonment in this country, in order that he might afterwards be executed in his own.

nected relation to each other; the attempt and the accomplishment are steps of the same crime.<sup>8</sup>

In the case of continuous crimes, the whole of the series of acts taken together will be treated as a continuous infraction of the law, and as the actual factors for determining the punishment of that act of the series by which the provisions of the criminal law were first transgressed. The judge, therefore, in whose territory it may be that only one of the several acts that constitute the continuous crime was committed, must judge of the whole series.

The opposite view would,<sup>9</sup> as will be shown to result from the principles of recognising punishment inflicted abroad, be at variance with the theory by which the various acts are all adjudicated upon at once as a single act, according to the conception of the crime as continuous—a theory which has for its object the more lenient treatment of the offender, who has, strictly speaking, earned the full penalty for every single act.<sup>10, 11</sup>

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<sup>8</sup> See, too, Farinacius, l. c. § 44. The opinion of Carpzovius (Præt. iii. qu. 110, n. 23), that where one crime has been carried on continuously in different territories, each judge can only take notice of so much of it as has taken place in his own country, is quite in error. If the one crime were so broken up, the criminal would often be too severely punished, and, likewise, would often escape punishment,—if, for instance, the crime were only made up by putting the different acts together.

<sup>9</sup> This view is adopted by Hälschner, p. 76. Cf. too, Pütter, p. 203.

<sup>10</sup> Cf. Leonhardt, Comm. i. p. 459.

<sup>11</sup> On the other hand, it is of no consequence that the act committed in one territory is in point of time near the other. We cannot therefore commend the view expressed by Merlin (Rép. Vo. Contrebande, n. iv; cf. Cosmann, pp. 57-8), that the thief who has stolen some article in country A, and, when pursued by the owner, kills him in country B, can be punished for both offences in country A as being the *forum delicti commissi*. If we give up the proposition that the *dolus* of the criminal is all that can unite the different acts into one whole, it follows that we may treat the whole course of a man's existence as a consequence of some previous act, and submit it to the local law to which that act was subject. The decision of the Court of Cassation at Paris given by Cosmann (pp. 55-6), by which the murder of a French custom-house officer beyond the French frontier was tried in a French court and by French law, because the act of murder was in connection with the smuggling on French soil could, as I think, only be justified on the hypothesis that there was sufficient evidence to show that the intention to murder had been declared on French territory.

The actual completion of a crime seems in relation to the act of any accomplice to be a result brought about in whole or in part by the act of that accomplice or instigator. He is therefore not subject to the criminal law of the country in which the principal act took place, but to that of the country where his own act was committed. But, if the principal act is not criminal by the law of the country where it actually took place, as a consequence the acts of all participators in it are beyond the criminal law also, unless their acts can be punished under some distinct category.<sup>12</sup>

It must also seem very hazardous to hold the place of the principal act to be the seat of the accessory act also if we refuse to give up our own subjects by extradition, and adhere closely to the principle of territoriality. Resetters of theft, for instance, who get possession of articles stolen beyond the frontier would drive their trade unpunished.

*Note FF, on § 142.*

[It has always been a difficult question to decide where the jurisdiction lies in the case of a continuous crime, committed in more than one territory, or in the case where an act,—such as the despatch of a threatening letter, or of a packet of poison, or the firing of a gun,—takes place in one territory,

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<sup>12</sup> Cf. the decision of the Supreme Court at Berlin, 9th Oct. 1856, given by Temme, Arch. iv. p. 162. All that can be got from the principle is that the act of the accomplice constitutes an accessorium of the principal act of the person who actually carries out the crime: it does not justify the view maintained by Hélie, p. 636, adopted so long ago as by Julius Clarus (Sent. v. S. fin. qu. 38, n. 6), that the place of the actual deed will rule. The English law lays down, in so far as regards the competency of trying crimes within the kingdom, that where the principal act takes place in one country and the act of the accomplice in another, the latter may be brought to justice in either country (7 Geo. IV. c. 64, c. 9, 10; cf. Stephen Maury, pp. 427-28); Farinacius, L. 1, tit. 1, qu. 7, note 44, is of opinion that the *forum delicti commissi* holds against the accomplice in both territories. The Criminal Senate of the Supreme Court of Appeal at Celle recognised in a judgment of 1st Nov. 1859 that one in Hanover who had aided and abetted in a perjury sworn in Prussia was subject to the criminal law of Hanover, and to the jurisdiction of the courts of Hanover (New Magazine for Hanover, R. 1860, p. 128). The same view is at the bottom of the judgment of the Supreme Court at Berlin of 5th Feb. 1858, given by Temme, Archiv. vi. p. 9.

while the result is produced in another territory. The view of the author is borne out by decisions of the Appeal Court at Berlin, 18th April, 1873, and 14th Nov. 1873, and at Munich, 18th Feb. 1873, pronounced since the promulgation of the German Criminal Code : these judgments hold that the crime is truly committed where the person sets himself in motion to commit it. In France (Fœlix, ii. § 551) it is the law that any crime committed by a Frenchman or a foreigner on foreign soil may be punished in France if the means of the crime have been prepared in France, or if the crime had its operation there, always providing that its quality is such as the French law holds to be criminal. But, again, the Appeal Court at Berlin has held, 24th Jan. 1872, and 1st July, 1875, that the last set of a series—*e.g.*, the actual delivery of a threatening letter written abroad—will determine the *locus* of the crime. The Court at Florence held on 26th March, 1879, in the case of an Austrian subject writing a threatening letter from Verona, in Italy, to Trient in Austria, that the crime was not committed till the letter was delivered, and that therefore the criminal must be tried in Austria.

The law of Scotland undoubtedly gives jurisdiction to the courts of the country where the crime was completed by taking effect, where, as it is said, the engine exploded. "If one compose and print a libel in England, and circulate it here, or if one forge a deed abroad and utter it here, certainly the proper courts for the trial of such a case are those of this country, since it is here that the main act is done which completes the crime. . . . Nay, more, it may be plausibly argued that he shall be subjected to the same course of trial who shall write an incendiary letter in England, and put it into a course of conveyance thence, by means of which it is received in Scotland" (Baron Hume on Crimes, i. 173). This principle has been applied in the leading cases of Bradbury, 25th July, 1872, 2 Couper, 311 ; Witherington, 17th June, 1881, 8 Rettie, p. 43. The decisions in these cases are all the more forcible, as the crime charged was in both cases the obtaining of goods under false pretences, the *species facti* alleged constituting no criminal offence in England, by the law of which country the prisoners in both cases claimed that they should be tried.

Where the crime is one recognised in all countries, there is probably, as is suggested by Lord Neaves in Bradbury's case, a concurrent jurisdiction in the two countries : the difficulties of adopting the law of the place where the result is produced as determining the quality of the offence are forcibly stated by Lord Young in the case of Hall tried at Perth, 25th March, 1881, 8 R. 28.

The criminal law of Switzerland provides that where a crime has been committed in several cantons, that in which the principal act was committed may require the surrender of all accomplices. It was so decided by the Federal Court, 12th Oct. 1877, in a case where the canton in which a theft had been committed required the surrender of resettlers from various other cantons.

In England it is determined by the cases of the *Queen v. Keyn* (1876, L. R. 2 Ex. D. 63) and *re Smith* (1876, L. R. 1 P. D. 300), that in the case of offences or torts, committed by means of the collision of one ship with another, it is not sufficient to give the English court jurisdiction that the ship suffering damage, or on board of which the offence—in *Keyn's* case manslaughter—take place, is an English ship. The point for consideration is not in what place the act was completed, but in what place the actor was.]

REASONS FOR EXCLUDING CRIMINAL JURISDICTION—PUNISHMENT  
SUFFERED—PARDON—PRESCRIPTION—ACQUITTAL—RESUMPTION  
OF THE INQUIRIES—PUNISHMENT IMPERFECTLY SUFFERED.

### § 143.

Criminal jurisdiction in respect of a crime may be excluded directly by punishment having been suffered, by a pardon, and by prescription, and this may also indirectly result from a final acquittal of the criminal, further prosecution after the verdict of acquittal has been pronounced being inadmissible. The effect that is to be given to such an exclusion of the criminal law, created by the statutes or the practice of one country, in another, if both of these countries lay claim to a concurrent jurisdiction in the particular case, has been made matter of dispute.

Let us first consider a case where the punishment has been fully suffered. According to our view both States have a criminal jurisdiction, and each must recognise the rights of the other. It follows, therefore, that the satisfaction which disarms the criminal law of the one State in time to come,—that is, the complete expiation of the guilt of the convict according to the laws of that State,—must have the like effect in the other State also, precisely as in civil law the satisfaction of one of two joint creditors does away with the claim of the other upon the debtor.

Pardon is a declaration by the sovereign that the claim which the State is entitled to make for punishment is to be dismissed. The effect of this, if the State was really in the position to put its claims into execution, is not merely that its own criminal jurisdiction is renounced, but at the same time the concurrent criminal jurisdiction of any other States is likewise extinguished.<sup>1</sup>

The case is otherwise in a question of prescription. The rule of law which declares that a crime is prescribed, is nothing but a declaration on the part of the legislature that that crime shall not be prosecuted by the officials of the State, or that the recognised punishment shall not be exacted,<sup>2</sup> because within the specified time no use has been made of one or the other law. Prescription, therefore, rests upon the consideration that the State was not in a position to make use of its criminal law, and it follows directly from this, that just as the prescription of an action by one joint creditor in civil law would not stop an action by another

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<sup>1</sup> Since there is no precedence among the courts of different countries, the criminal must actually have been in the power of the State which issues the pardon (Farinacius, l. c. n. 58; Mevius, Decisiones, p. iv. decis. 277; Feuerbach, § 516; and judgment of the Supreme Court of Appeal at Cassel of 19th Aug. 1844, reported by Heuser; remarkable decisions of the Court at Cassel, i. pp. 686-87). But it is not necessary, as Breidenbach, p. 269, lays down, that an inquiry should have been instituted in the foreign State at the time of the pardon. A general amnesty therefore will, under the conditions required in the text, have the same effect. It is certainly impossible to see why a pardon, which blots out what remains of a sentence incompletely carried out, is not to be determined by the same principles as any other exercise of the privilege of mercy (Breidenbach, as cited).

<sup>2</sup> Cf., *e.g.*, Code Penal, arts. 635-36.

joint creditor of another country, in so far as the State does not claim a right that is merely subsidiary,<sup>3</sup> the prescription which has taken effect in one of the two States which has jurisdiction, shall not be regarded in the other. [But in a case where extradition of a criminal is demanded, and the crime has by the law of the country where the criminal is at the time, undergone prescription, the demand should not be complied with. So held in Switzerland, Federal Court, 25th July, 1877, in the case of Mattiotti.]

A judgment of acquittal is a declaration of the Court which administers the criminal authority of the State to this effect, that no sentence against the accused can be justified, either because his guilt was not proved, or because the act in question could not be punished. The *lex specialis* implied in a judgment of this kind must have the same, but no greater effect upon the criminal jurisdiction of the other country than a *lex generalis* to the same effect.<sup>4</sup> In so far, then, as a deliverance by the law of the place where the deed was done excludes punishment in the domicile of the accused, it will be excluded by such a judgment; whereas a judgment of this kind pronounced at the domicile of the accused does not by any means exclude a prosecution by the State in whose territory the deed was done.

As regards, however, judgments to the effect that the guilt of a prisoner has not been proved, the application of the axiom, so widely recognised, "*ne bis in idem*," is excluded on this account—viz., that although it may be laid down that the application of the criminal law to the *factum* is a matter solely for the court to determine, and that all charges depending in any possible way upon the same *factum* should be brought to a head in one action,<sup>5</sup> this is only applicable

<sup>3</sup> Cf., e.g., the Austrian Penal Code, §§ 39-40.

<sup>4</sup> Cf. Breidenbach, p. 261.

<sup>5</sup> It is otherwise in the Roman law. If the same *factum* implies a trespass upon several criminal statutes, the trial may first take place as against the one, and then against the other. (Cf. L. 9, de accus., and especially Geib. Geschichte des Römischen Criminalprocesses, p. 655. See Savigny, System, v. p. 251, as to L. 14 D. de accus., which seems to be contradictory.) But the criminal laws of different States must be held to be different *leges*. (Cf., too, Leonhardt, Justizgebung für das Königreich Hannover, 3rd ed. vol. iii. p. 50, note 5.)

to the case where the judge is in the position to apply all the rules of criminal law that can possibly have reference to the case in hand; and the application of foreign criminal law, to the effect of imposing punishment, and not of pronouncing that the act is non-criminal or should be leniently punished, is out of the question. The result of the rule "*ne bis in idem*," is not this, that the concurrent criminal jurisdiction of the other State is only excluded by a punishment completely expiated or remitted from merciful considerations, but rather that the foreign judgment *per se*, or, indeed, strictly speaking, the institution of an inquiry in a foreign country, will have this effect—a doctrine which will scarcely be admitted.

Although, then, it can be just as little maintained<sup>6</sup> that, like a sentence of condemnation that has been carried out, a judgment of acquittal by a foreign court must be recognised, since the rule "*ne bis in idem*" is a pure rule of process, and it will be admitted, that under certain circumstances, a criminal prosecution may be resumed even within the same country after a judgment of acquittal, while the rule that no one can be twice punished for the same crime rests upon considerations of material justice;<sup>7</sup> there is an equitable foundation for giving to a judgment of acquittal upon the facts, if it has been pronounced in a foreign State, the same effect as if it had been pronounced by a native court, so far at least as confidence can be reposed in the justice and equity of the sentence pronounced in a foreign country;<sup>8</sup> there must be great doubt as to the guilt of a person who has been acquitted by a regular court of some State upon the same grade of civilisation and morality as ourselves, even although a court of this country might happen at a subsequent period to arrive at a condemnatory judgment, and we must consider what a bad impression contradictory judgments as to the same facts in two neighbouring States must have upon the general respect for the administration of justice.

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<sup>6</sup> Maintained by Leonhardt, in the Magazine for Hanoverian Law, 1859, p. 409.

<sup>7</sup> Otherwise the criminal would be punished twice—*i.e.*, illegally.

<sup>8</sup> Cf. Breidenbach, p. 261.



This fact, and the fact that the criminal lawyers of the later Middle Ages always adhered to the conception of one common criminal law for all Christian peoples, and that this theory has all along exercised a great influence upon the later doctrine, explains how the prevailing opinion has always been in favour of a recognition of a judgment of acquittal in a foreign country; so that, unless there are special statutory regulations to a contrary effect, I should certainly hold that foreign judgments of acquittal ought to be tacitly admitted to rank on an equality with those of this country, always under the limitation stated in the case of judgments to the effect that the act is not criminal.

A resumption of any inquiry is, however, as follows from the equality of foreign and native judgments, only permissible in so far as the laws of this country permit or require such a course in the face of a judgment pronounced here; for the ground for excluding further criminal procedure lies not in the formal legal authority of the foreign judgment, which must be settled by foreign law, but in equity, and depends on a consideration of the benefits which will generally result from placing a foreign judgment of acquittal on a level with a native judgment. (On similar grounds the resumption of the inquiry in the face of a foreign judgment of condemnation, which has been carried into execution, is to be determined according to the law of this country.)<sup>9</sup>

A sentence imperfectly expiated—it must be remitted partly by the prerogative of mercy, in which case the rules laid down with reference to pardons will apply—cannot be looked upon as a satisfaction which will take away the criminal jurisdiction of the other State, since it by no means bears this signification even to the State which itself imposed the punishment.

The criminal jurisdiction of the other State which was originally competent, continues, therefore, to subsist. But in such a case, if it is possible to give up the criminal by extra-

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<sup>9</sup> A judgment of a foreign court which holds the instance to be bad, has no more effect in stopping an inquiry before our courts, than a judgment of a court to whom an accusation is referred (*Anklagesenat*) that the offence should not be prosecuted. Cf. Breidenbach, pp. 261-62. But in most cases, as a matter of fact, such a decision would be respected.

dition, this will be done ; or, in the opposite case, the punishment which has been endured in the foreign country must be reckoned in upon all principles of equity, since in any other case it is plain that the accused would suffer too severe a penalty.<sup>10</sup>

Where, however, the State assumes a duty in virtue of its own laws—not even to be derogated from by the law of the place where the act was committed—as in the case of crimes against the State itself, it cannot recognise the acts of the foreign State, even although it has proceeded in conformity with its own laws. Even although a punishment, which is almost equivalent to that which would be pronounced here, has been fully worked out, that cannot, *ipso jure*, exclude a second prosecution in our country, but can only give some ground for counting in the punishment which has been imposed and suffered abroad. If we were to give such a punishment the effect of excluding all further prosecution, we should not be able to punish a person guilty of high treason who had been visited with a trifling punishment abroad on account of hostile acts against our State, and we should perhaps be forced to leave him in the enjoyment of all his political privileges.<sup>11</sup>

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<sup>10</sup> It seems most correct to impose by the sentence the full punishment awarded by the law of this country, and to deduct expressly that which has been suffered in the foreign country. The punishment already suffered can have no effect in mitigating the statutory results of the crime imposed upon it by the law of this country ; for, if it were so, in cases where the position of the convict as a citizen is affected by his sentence, there might easily be an inequitable advantage given to a person who had suffered his punishment in another country. Cf. the “motif” of the 13th Art. of the new Bavarian St. G. B. Special provisions must be made in all codes for the case where a sentence of death is imposed by the law of the criminal’s domicile. Cf. *infra*, note 25.

[It was decided in France (C. de Douai), in the case of a Belgian woman who had been condemned in absence to a period of two years’ imprisonment, and who had, in respect of this sentence, which had been intimated to the Belgian authorities,—to whose territory she had made her way,—been subjected to a fine of 50 francs, that upon her return to France there was no bar to the execution of the sentence of the French court, but that it was in the discretion of that court to estimate the proportional value of the Belgian penalty and deduct it. Wattier, 31st March, 1879.]

<sup>11</sup> See the arguments urged by Leonhardt (Magazine for Hanoverian Law, 1859, p. 409), against the general language of the provision incorporated with

The views of most authors, and the enactments of the most modern codes, coincide with the results at which we have arrived, with some isolated exceptions. As a rule, the only question thoroughly discussed is, whether a sentence carried into effect in a foreign country, and a judgment of acquittal, exclude all further prosecution.<sup>12</sup> Many proceed upon this point from the rule "*ne bis in idem*."<sup>13</sup> The mistaken application of this rule does not, however, square at once with the doctrine which attributes that effect solely to a judgment that has been carried out,<sup>14</sup> and with that which refuses

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the revised Hanoverian Criminal Ordinance on the suggestion of the Chambers. "A plea of nullity may be taken, . . . (12.) If two sentences are pronounced against the same person for the same act, and the latter is liable to be set aside by such a plea. If the first deliverance is pronounced by a foreign court, this plea of nullity may be advanced, provided that—

"The State whose courts have pronounced it was entitled, by virtue of openly advertised State treaties, to require the extradition of the accused person for trial and sentence; or that—

"The extradition of the accused,—or, it may be, the execution of the punishment,—was required or conceded in consequence of a special agreement; or that—

"The punishment imposed by the foreign courts has been completely worked out."

<sup>12</sup> The Code for Anhalt-Dessau (art. 3), provides that punishment for crimes committed abroad shall not be imposed, if they have already been investigated, and a judgment of acquittal or a sentence pronounced upon them abroad. The Code for Hesse and Nassau, arts. 4, 2, and 4, and art. 5 *ad fin.*, excludes punishment in the case of natives for any crime committed there or in another country (if in Hesse or Nassau, only if, further, the crime was directed against a foreign State, its officials or adherents), if the accused has been already punished or acquitted in a foreign country, and excludes all punishment in the case of foreigners who have committed any crime in these countries against a foreign State or its officials, and have been already punished or acquitted in such foreign State. The Codes of Prussia, Bernburg, Waldeck, § 34 (Oldenburg, art. 3), agree with this.

<sup>13</sup> Cf. Arnold, in *Gerichtsaal*, 1857, p. 343; Witte, p. 63. See, on the other hand, specially Wächter, *Sächs. Strafr.* p. 164, note 2.

<sup>14</sup> Arnold, O. S. 351. Hélie (p. 621) draws, on the other hand, this very important inference, of which Wheaton, § 121, p. 166, seems to approve. In the Code d'Instruction it is substantially adopted, except in the case of crimes against the State. The recognition, however, of the sentence of a foreign judge, which has been carried into execution, upon the ground of the rule that no one shall be twice punished for one and the same crime (cf. *e.g.* the Code of Hanover, art. 86), can only be admitted if, in laying down that rule, the legislator had truly in contemplation all international aspects of the

to carry out a sentence pronounced in a foreign court, and lays down that it is the law of the criminal's own country that

case. (That is, for instance, undoubtedly the case with the Code of Brunswick, as is illustrated by proceedings taken upon § 69). The practice of different countries has certainly been to make use of some such rule in order to exclude a repetition of a sentence, after punishment has already been fully or partially carried out in another country. See the practice in Saxony before the publication of the Code of 1855 (cf. Wächter, *Sächs. Strafr.* p. 165), and a judgment of the Supreme Court of Appeal at Celle—the latter, indeed, merely in a case where the punishment had not been fully worked out (*Magazine for Hanoverian Law*, 1855, p. 336). See, on the other hand, Leonhardt, *Justizgesetzgebung des Königreichs Hannover*, 3rd ed. vol. iii. p. 50, note 5. This judgment of the court of Celle was the occasion of the adoption of the rule stated in the previous note in the revised Criminal Ordinance, a provision, however, which, as Leonhardt points out, opens the door to the greatest dangers. The earlier rules (Ordinance of 26th February, 1822, and Declaration of 18th February, 1823), give the following results according to Leonhardt's view, which I regard as correct : 1st, The power of the State of Hanover to punish crimes committed against the State of Hanover, its sovereign, or Government in any foreign country, either by foreigners or by natives, is not limited by a judgment of a foreign court either of acquittal or of condemnation ; 2nd, On the other hand, the criminal jurisdiction of the State of Hanover disappears, if there be a judgment of a foreign court in condemnation and also a sentence fully carried into effect, or a judgment of acquittal on account of a crime committed abroad either by Hanoverians or foreigners upon a subject of Hanover, or by Hanoverians upon a foreigner. The Criminal Code of 1840 contains, in art. 3, the following regulation in reference to foreigners :—"The Criminal Code is to be used against all foreigners on account of any crime committed by them in this country, and on account of crimes committed by them abroad against the State of Hanover. It will also regulate their punishment for offences committed upon Hanoverian subjects abroad, so far as they have neither been acquitted nor punished for such offences according to the law and the sentence of any court of a foreign State, or in so far as there may be reason for resuming the inquiry even after a judgment of acquittal in the foreign State ;" whereas there are no rules at all laid down for the satisfaction of the criminal jurisdiction over crimes committed by Hanoverians abroad. It was very doubtful, even before the publication of the Revised Ordinance upon Criminal Jurisdiction, in how far the older rules of the Ordinance of 1822 could still be applied (cf. V. Klencke in the *Magazine for Hanoverian Law* of 1857, p. 112, and Leonhardt, p. 399). In most of the modern codes the exclusion of a criminal prosecution is expressly limited to the case of a judgment of condemnation fully carried out. So in the Code of Würtemberg (cf. Hufnagel, *Comm. i.* p. 6 ; Berner, p. 114) ; in that of Baden, § 8 ; Prussia, § 4, 3 ; Sardinia, § art. 10 (cf. Fœlix ii. § 558) ; in the Criminal Ordinance of the Netherlands of 1838, art. 10 (Fœlix ii. § 459). The like may be stated upon a sound reading of the Saxon Code (cf. Wächter, p. 168).

must determine the competency of resuming the prosecution.<sup>15</sup> The distinction which has already been made between the different kinds of acquittals has, however, been as yet but little regarded.<sup>16</sup> Some authors<sup>17</sup> lay down that, on strict principles, no recognition of any condemnation in a foreign country, or even of the complete expiation of the sentence, can be justified ; it is only upon equitable grounds that they recommend the abandonment of further prosecution. Several judgments of German courts, in countries where there are no special enactments upon the point, have followed this theory,

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<sup>15</sup> The competency of resuming the procedure must be determined by the law of the criminal's own country, unless the legal sentiment of the State is to be offended, as would be the case where a native of this country was sentenced abroad, and afterwards proof of matters in defence was discovered, which would be a good ground for resuming the inquiry according to our law, but not according to foreign law (cf. Gross, im Archiv. d. C. R. 1853 ; Ergänzungsheft. p. 56 ; Wächter, Sächs. Strafr. p. 173 ; and Schwarze, Gerichtsaal, 1860, pp. 177-208). If the formal legal authority of the foreign judgment were recognised, it would be necessary that the matter should be determined by foreign law, and in many cases that determination could only be given by a foreign court. The Code of Baden expressly provides, § 8 :— "When any person has been acquitted or condemned for some criminal offence before a foreign court according to forms of law, a new prosecution or verdict for that offence can only take place under the same conditions as are required for the resumption of an inquiry into a criminal offence, which has already been concluded by a valid verdict in this country, as, for instance, if the criminal has by flight escaped from the execution of the sentence pronounced upon him abroad."

<sup>16</sup> Cf., however, Breidenbach, p. 261. The necessity of such a distinction appears very plainly from the following illustration. According to the theory we have adopted, and which most legislatures have at least tacitly taken up in questions of prescription, it is only the law of this country that can be applied, unless the State is exercising a merely subsidiary right. If, however, the court of a foreign country acquits the accused, because the prescriptive period has run, then, according to the theory that the judgment of a foreign court must be held to be *res judicata*, all prosecution in any other State is barred (to that effect, Berner, p. 163). It is not easy to see, however, how a judicial decision which merely expounds the law should have greater force than a general statute promulgated by the sovereign.

<sup>17</sup> Heffter, Strafr. § 27, § 3, 181, § 2 ; Völkerr. § 36. See, on the other hand, Köstlin, p. 37. Tittmann (p. 33) proposes that a punishment carried out in a foreign country should be recognised, except in the case of crimes by which the State where he is subsequently apprehended or its subjects are damaged. This view is a deduction from the theory of prevention already used in Tittmann's earlier work.

and, in particular, where there are questions as to the punishment of their own subjects for offences committed abroad, have simply taken into account the amount of punishment suffered abroad.<sup>18</sup> As Schwarze remarks,<sup>19</sup> this is certainly correct, if we assume that the binding force of the law of this country continues exclusively to affect our subjects while abroad. It is, however, irreconcilable with the recognition of a concurrent criminal jurisdiction in the foreign State of equal force, and leads in many cases, since contradictory judgments may so easily be pronounced in the different States, to disadvantages which are out of all proportion to the very questionable advantages<sup>20</sup> to be got from it.

Pardons and amnesties are treated by many authors<sup>21</sup> on the same footing as punishment suffered, or judgments of acquittal. Arnold and Schwarze regard them to a certain extent as verdicts of acquittal pronounced according to the unfettered discretion of a higher tribunal, whose privilege it is to put in force the highest equitable considerations, which cannot be expressed in special criminal statutes. But it is permissible, and as a matter of fact it often happens that pardon is given for other reasons than those of the highest equity—*e.g.*, for the good of the State.<sup>22</sup> Many authors, therefore, still

<sup>18</sup> Cf. the judgments of the Supreme Court of Appeal at Cassel and at Munich, in Temme, i. pp. 39-40, iv. p. 2; Dollmann Bayer. Strafprocessg. p. 186. The Austrian Code, as regards Austrian subjects, prescribes specially in § 36, div. 2: "If an Austrian subject has already been punished abroad for any act, the amount of that punishment is to be imputed to any sentence competent under this code." The judgment of the Court of Cassation at Vienna given in Temme, i. p. 44, applies this rule to the case of a crime committed by a foreigner in Austria and already punished abroad.

<sup>19</sup> P. 192.

<sup>20</sup> *E.g.*, highly expensive prosecutions would have to be undertaken to add some trifling period to the punishment.

<sup>21</sup> Berner, p. 137; Arnold, Gerichtsaal, p. 352; Schwarze, Gerichtsaal, 1860, p. 39; Gross, Arch. d. C. R. 1853; *Ergänzungsheft*. p. 59; Cf., too, Welcker, in Rotteck's and Welcker's Staatslex. i. App. ii. p. 270; and Klencke, in the *Magazin für Hannov. Recht*. 1851, p. 86.

<sup>22</sup> Martens, § 105; Klüber, § 64; Leonhardt, *Comm. i.* p. 57; Breidenbach, p. 269; Wächter, *Sächs. Strafr.* pp. 173-74, who calls special attention to the fact that pardon may be a matter of favour, because it is not restrained by any hard and fast limits, but he argues correctly that where one State prosecutes a criminal only as the representative of another State, the pardon

cling to the older view, which does not allow a pardon any effect in a foreign country, and commit the question of the recognition of one pronounced abroad to the discretion of the department which has the prerogative of pardon in their own country. In my view, as I have just endeavoured to show, there is no need of any such enquiry as to the foundation on which the theory of pardons rests; to this I may add that a second enquiry into the same matter must always seem highly dangerous, and that the recognition of a pardon pronounced abroad is founded upon considerations of the general security of intercourse;<sup>23</sup> and, finally, that scarcely any substantial interest in punishing a criminal pardoned abroad can be figured, if we except the case of crimes against the State.

Most authors share our view<sup>24</sup> as to the incomplete term of punishment, and it is either expressly or tacitly approved in most codes.<sup>25</sup>

which the latter has given must be respected. If, for instance, an Englishman committed a crime in England against an Englishman or a Frenchman, and was pardoned for it in England, could he be again tried and punished if he came to Saxony? In several criminal codes, a pardon given in a foreign country is expressly recognised as a ground for cancelling punishment. It is so in the Codes of Würtemberg, arts. 3-4, of Hesse 1, and of Nassau, art. 4 (in this case only to a limited extent in conformity with the rule "*Volenti non fit injuria*"), but quite generally in the Codes of Prussia, Anhalt-Bernburg, and Waldeck, § 4, with the exception of crimes against the State—an exception sanctioned in the text. Most codes are silent as to the effect of a pardon in a foreign country.

<sup>23</sup> In the opposite view, a man who had been pardoned in one State could not cross its frontiers without exposing himself to the hazard of a new trial and punishment. Could we subject a convict, part of whose term of punishment in a foreign country had been remitted on account of good behaviour, to a new trial?

<sup>24</sup> Köstlin, pp. 37-8, note 1. The Code d'Instr. and Ortolan (No. 908) are to the opposite effect, the latter because the criminal law must be clear and simple.

<sup>25</sup> Cf., e.g., Bavarian Code of 1861, art. 13. It also specially enacts: "If in one of these exceptional cases, in which a new trial and sentence can take place after one judgment has been given abroad, a verdict of guilty shall be given by a competent court in Bavaria, regard may be had to the punishment which the guilty party has already suffered for the same Act in another country to this effect, that the punishment due by the laws of Bavaria shall be imposed, but thereafter declared to be remitted in whole or in part

Prescription, according to Berner<sup>26</sup> and Wächter,<sup>27</sup> must be determined by the same law as that from which the judge must derive the punishment he is to impose, that is to say as a rule by the law of the judge who is charged with the whole prosecution, as we have laid down.<sup>28</sup> In most statute books no special mention is made of prescription; it seems therefore that every judge, unless he is merely exercising a subsidiary jurisdiction, must regard his own law alone. This is expressly provided in the Code of Würtemberg.<sup>29</sup> Köstlin<sup>30</sup> proposes that all grounds for the cancellation of punishment should be treated alike. But, as will be seen from what we have already said, the entirely distinct character of these different reasons militates against this.<sup>31</sup>

Lastly, the exception that crimes committed against the State<sup>32</sup> cannot be withdrawn from the criminal jurisdiction of that State by any ground of cancellation which may be found in the laws of a foreign country is expressly recognised in several Codes;<sup>33</sup> it rests however, except in so far as it is defended on a purely practical ground,—*i.e.*, on the ground that such acts are not sufficiently punished in a foreign

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according to circumstances. If the question is as to a crime punishable by death according to Bavarian law, and if the accused has already undergone a punishment of two years or more confinement in a foreign country, he shall be sentenced to imprisonment for life."

<sup>26</sup> P. 164.

<sup>27</sup> Sächs. Strafr. p. 164, note 5. So, too, Dollmann Bayer. Strafprocessges. i. 184.

<sup>28</sup> A foreign judgment, which is swept away on the plea of prescription founded on foreign law, is no reason for excluding the jurisdiction of the courts of this country, cf. Breidenbach, pp. 267-68, and note 12 to this paragraph.

<sup>29</sup> Cf. Hufnagel, Comm. i. p. 17. Fœlix proposes to apply that law which is more merciful (ii. § 602).

<sup>30</sup> P. 37. Köstlin, who holds the principle that every State punishes crimes as the delegate of that State in whose territory they were committed, is of opinion that in such a condition of affairs any grounds for cancellation which arise in the one State must at once be recognised in the other. In consequence, our State, if it has sentenced a criminal and has him in gaol, must recognise a pardon pronounced by a foreign sovereign whose courts did not pronounce the sentence, if the act was committed in his territory.

<sup>31</sup> See, on the other hand, Wächter, Sächs. Strafr.

<sup>32</sup> Cf. *supra*, § 139.

<sup>33</sup> Prussian Code, §§ 3, 4; Bavarian Code of 1861, art. 13.



country,—on the theory that a subject, whether permanent or temporary, by committing a crime against the State, commits a special breach of duty of which the laws and the courts of any foreign country can have no cognisance.<sup>34</sup>

In the foregoing discussion we have throughout proceeded on the assumption that the ground for cancellation or mitigation of punishment has occurred in some country which is competent to inflict punishment. According to the theory already given, no State, with one exception, is competent unless it be the State of the criminal's domicile, or the State in whose territory the act was done. However, looking to the great variety of legislation, and the great difference of opinion which still prevails as to the competency of this or that State in criminal matters<sup>35</sup> (by which, however, the criminal must not suffer), every act of a foreign court or a foreign sovereign must be treated as if the State in whose name it was done was truly competent to it. By foreign courts we mean courts established by a foreign sovereign; on the other hand, the jurisdiction of foreign consuls exercised by them in exceptional cases in foreign countries in the name of our State, is not to be held to be a foreign jurisdiction.

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<sup>34</sup> So the Prussian Code, § 4, in reference to the acts of foreigners described as treasonable or as of the nature of coining offences, and in reference to similar acts by a Prussian; so, too, similarly Code d'Instr., the Sardinian Code (Felix, ii. No. 558). The Code of Saxony, 1855, contains this exception, in art. 9: "If a person has already been criminally punished by a foreign court, he can only be punished for the same crime a second time in the courts of this country, if the act, by reason of some special obligations incumbent upon him towards this country, its sovereign or its subjects, has a more serious character which the foreign sentence could not take into account; but even in such a case the punishment already suffered elsewhere for the same act must be deducted. This is also done if the punishment has been carried out by an incompetent court abroad." The theory of the Prussian Code is, in my view, preferable. The addition in the Saxon Code of duties towards private persons confuses the case. On the other hand, the provisions of the Saxon Code as to the imputation of the punishment suffered abroad are in accordance with justice. Cf. however, Arnold, p. 353; Schwarze, pp. 196-200.

<sup>35</sup> Cf. Wächter, Sächs. Strafr. p. 167, note 15. The Prussian Code speaks generally of foreign tribunals without mentioning the necessity of their competency.

## PREVIOUS CONVICTIONS.

## § 144.

In criminal law a relapse into crime constitutes as a rule a special aggravation—*i.e.*, when a criminal has already been convicted of the same or of a similar crime, and has suffered punishment according to the provisions of any particular law.

The question as to whether foreign convictions can be considered in such circumstances is variously answered in different codes.<sup>1</sup>

In my view it should be settled in this way. Relapses into crime are more severely punished, because they are held to imply that the criminal purpose is of greater intensity and more obstinate than in other cases. It is assumed that as a rule the punishment which is imposed is sufficient to break this criminal purpose, for the very object of all punishment is to reconcile and to remove this criminal character. It must therefore be held to be indifferent whether this punishment<sup>2</sup> proceeded upon a sentence of this country, or of any other, if it really was imposed on account of the crime in question, because in both cases the obstinacy of the criminal purpose is proved in the same fashion by the repetition of the crime. But, since we cannot attribute any effect that can be recog-

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<sup>1</sup> The Codes of Hanover (art. 112), Nassau (art. 91), and Hesse (arts. 96, 100-01)—the latter with important exceptions which lead to remarkable results,—Baden (art. 188), answer it expressly in the affirmative. (In Brunswick we get the same result from the report of the Commission, § 58; see Breymann, p. 119), while the Prussian Code, art. 58, adopts the opposite view in every case, and that of Würtemberg (art. 124) as a general rule, from which exception is made only in the case of foreign vagabonds who have been guilty of robbery, theft, or swindling in trade. The older Italian writers discuss the question whether, in countries where a third conviction of theft infers hanging, the two convictions obtained abroad are to be counted in the case of a foreign subject. Clarus (Sentent. L. V. Furtum, n. 10) makes this distinction: "*Aut statutum respicit poenam, puta pro tribus furtis fur moriatur et tunc non gravant. Aut statutum respicit factum, puta qui tria furtia fecerit moriatur, et tunc secundum delictum gravatur a primo.*" Angelus Aret. de Maleficiis. Rubr. Etiam Vestem, note 14, decides in both cases for the more severe punishment.

<sup>2</sup> It is always a condition, however, that our law recognises the punishment as one that will have a deterrent effect upon the criminal punished.

nised in this country to a foreign sentence, in so far as it has not been carried out, it follows that although our law will find even in a sentence that has been pronounced in this country, but not carried out, material to justify the treatment of a second offence as a relapse,<sup>3</sup> the same course cannot be taken with foreign sentences, and even where the punishment imposed by a foreign sentence has been fully carried out, an inquiry into the justice of the conviction by the foreign court cannot be avoided.<sup>4</sup>

The difficulties by which such an inquiry is attended,—especially if the criminal procedure rests in both States upon oral testimony,—account for the divergence of the law of Prussia and Würtemberg from the theory which is recognised as correct, and by which punishment expiated abroad is treated as an aggravation of a second offence.<sup>5</sup>

#### V. APPENDIX.—RIGHTS OF EXTRA-TERRITORIALITY—CRIMES ON SHIPBOARD—CRIMES OF SOLDIERS IN FOREIGN TERRITORY—PIRACY—SLAVE-TRADE.

##### § 145.

There is some dispute as to whether ambassadors are subject to the criminal law of the country to which they are

<sup>3</sup> So, for instance, the Prussian Code. There they proceed upon the theory that the condemnation in itself is a sufficient warning to justify a sharper punishment if the offence is repeated. Cf. Beseler, *Comm.* pp. 213-14.

<sup>4</sup> Such an inquiry, according to the Code of Baden, § 186, takes place even when the first judgment is pronounced by a court in Baden. Cf. Brauer, *im Gerichtsaal*, 1859, p. 381.

<sup>5</sup> Cf. Beseler, *Comm.* p. 214; Hufnagel, p. 267-68; and in defence of our theory, Abegg, *im Archiv. d. C. R.* 1834, p. 422; Mittermaier, in his notes to Feuerbach's *Lehrbuch*, § 332, note 2. Ortolan (No. 1200; cf. Pütter, p. 194; Cosmann, p. 59) decides the question in the opposite way, upon the ground that on the one side foreign judgments have no binding effect upon the courts of this country, and upon the other that it has not yet been shown in the case supposed that the law of this country has no effect upon the criminal. But the first of these reasons merely calls for a new inquiry into the procedure that has taken place, and the sentence that has been pronounced abroad, and the second proves too much. From it we should have to infer that, if the criminal code of any country was changed, all sentences pronounced by the courts of that country under the rule of the old system would have to be thrown out of account as previous convictions.

accredited, and in whose territory they reside, and if so, to what extent.

By one theory the question is answered absolutely in the negative, and full exemption is thus guaranteed to the ambassadors.<sup>1</sup>

A second theory starts with the proposition that an ambassador who is guilty of serious crime,—*e.g.*, incites the subjects of another country to revolt,—deprives himself even of the protection afforded by public international law, and is therefore liable to be punished.<sup>2</sup>

A third theory—which has, however, found but few adherents—proposes that ambassadors should enjoy no exemption from the laws of the land, but should suffer no prejudice thereby.<sup>3</sup> The necessity of maintaining public order is by this theory used to meet the argument on which the first theory rests—*viz.*, the necessity of giving an ambassador an independent position.

If we keep in view, first, that the ambassador represents a foreign sovereign, and that one sovereign cannot be subject to the other,<sup>4</sup> and, second, that the independence of the ambassador is as much imperilled by charges of a serious nature as by lighter accusations, we are forced to pronounce in favour of the first theory, which is, besides, generally recognised at the present day, especially as the injured State has in the last resort the right of defending itself by banishing the person.<sup>5</sup>

It follows necessarily that all persons truly belonging to an embassy enjoy this exemption from the penal law of the country, and in the interest of the independence of ambassadors this privilege is also by international usage extended to the family of the ambassador living in his house.

<sup>1</sup> Grotius, ii. c. 18 ; Vattel, iv. chap. 7 ; Bynkershœck de foro competente legatorum, c. 8, § 2. The ambassador continues subject to the law of his own country, Berner, p. 208.

<sup>2</sup> Thomasius, Jurisprud. div. iii. c. 9, § 86 ; Barbeyrac, Notes sur Bynkershœck, c. 24, § 12 ; Hélie, p. 142. Some limit the criminal law to the case of a serious crime against the State itself.

<sup>3</sup> Coccejus, Jus Controv. L. 40, tit. 7, de legation, qu. 3.

<sup>4</sup> Berner, p. 208.

<sup>5</sup> Cf. Heffter, §§ 42, 214 ; Wheaton, § 225, p. 285 ; Fœlix, § 566 ; Oppenheim, p. 197 ; Ortolan, No. 515.

It is questioned whether servants, on the other hand, and in particular servants belonging to the country in which the embassy is stationed, can make the same claim.<sup>6</sup> The independence and immunity of the ambassador are completely protected if previous notice is given of the apprehension of any of his servants, or of a search of their premises, or any other diligence, whereas it would be quite intolerable that a criminal belonging to the suite of an ambassador should have to be conveyed to the country in whose service his master is.<sup>7</sup> This question is therefore properly answered in the negative.

It needs no discussion to show that foreign sovereigns are not subject to the criminal law of the country in which they may be temporarily resident. On the other hand, other members of a royal family will only be allowed the privileges of extra-territoriality if they are immediately in attendance upon the sovereign.<sup>8</sup>

Ships of war represent directly the majesty of the State; they are, therefore, as they are physically distinct from the territory of the State in whose ports they may be, held distinct in law from it, and are viewed as parts of their own

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<sup>6</sup> See on the various views, Heffter, § 221; Berner, p. 212; Merlin, Rép. Vo. Ministre Public. p. 6, n. 5, 6; Hélie, ii. p. 554.

<sup>7</sup> Ambassadors, except the representatives of European powers in the East, are no longer allowed a criminal jurisdiction of their own. Cf. Heffter, §§ 246-47. In any case the exemption of the servants, as it exists merely in the interest of the ambassador himself, can only avail to suspend, and not absolutely to exclude, the criminal law of the State, so that when the service terminates the servant may be called upon to answer for acts done by him during that period. This is the consideration on which the judgment of the Supreme Court at Berne, reported by Temme, Arch. i. p. 24, proceeds: by this an arrestment in security of judgment which should be called for when the service terminated was sanctioned while the service still subsisted, the charge being one of smuggling wine which had been found in the house of an inhabitant of Berne. [The fact that the crime with which the prisoner is charged was committed in the hotel of the ambassador of a foreign power, will not exempt the prisoner from the jurisdiction of the courts of the country, if he is not a member of the ambassador's suite, Reichsgericht at Berlin, 26th Nov. 1880.]

<sup>8</sup> Heffter, § 55; Berner, p. 214. Some propose that the heir-apparent should always have it. The international rights of a sovereign, as well as merely the courtesies of the position, are accorded to one who is really conjoined in the government or who administers a foreign State.

country, and moveable forts belonging to it.<sup>9</sup> Troops in an enemy's country are in like manner subject only to the criminal law of their own country.<sup>10</sup> On the other hand, there seems to be some doubt as to the position of troops in a neutral or in a friendly State. Although the army as a whole represents the State in its military aspect,<sup>11</sup> there is not in this case any physical separation, and it is impossible to invest each individual soldier with that representative character. The following solution of the question seems most correct<sup>12</sup>:—Crimes and offences against comrades and officers, or against discipline, or against the State to which the army belongs, are principally matters affecting the order of the army itself; and as a foreign army, which has been suffered to enter the country, must be allowed to maintain its discipline and order, are subject to the law and to the courts of the country to which the troops belong. On the other hand, it cannot well be held that the criminal authority of the State in whose territory the troops happen to be is *ipso jure* excluded in the case of crimes which imperil other persons not connected with the foreign army, or endanger the public peace. [A judgment of the Court of Rheims, 10th June, 1877, affirmed by the Court of Paris, 14th July, 1877, held that French courts had jurisdiction to try for theft a person attached to the German army, but not actually a soldier.]

But although our army in an enemy's country remains subject to our penal law, the delicts committed there by other persons are by no means made subject to it. The invasion only excludes the application of the law of the invaded country to the invader, but does not otherwise disturb any of the legal relations of that country.<sup>13</sup>

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<sup>9</sup> Ortolan, No. 935. In France it is even held that French courts are incompetent to deal with crimes committed on board a foreign merchant ship among its crew within a French port, unless the peace of the port is broken, or the ship is intended for an attack upon the French Government or its citizens. Ortolan, Nos. 936-37.

<sup>10</sup> This follows from the right of possession, Ortolan, No. 942.

<sup>11</sup> On this ground, Berner unconditionally adopts the principle of extra-territoriality, pp. 215-16.

<sup>12</sup> So Ortolan, No. 939.

<sup>13</sup> Cf. Ortolan, No. 942, and the judgment of the Court of Cassation at Paris of 1818, there cited.

Ships of war on the high seas are also held to be part of the territory to which they belong, and, by public law, the sea within cannon-shot of the shore belongs to the jurisdiction of the country which it bounds.<sup>14</sup>

Piracy—*i.e.*, the forcible seizure of ships and property on shipboard without commission from any responsible Government—is held to be an offence against the common legal order of all nations. Any State that seizes a pirate may punish him.<sup>15</sup>

Slave-trading, on the other hand, does not fall under the category of an offence against the common legal order of all nations. It is only the subjects of those States which forbid the trade that can be made answerable for this, and that only in the courts of their own country, unless there are provisions to a different effect in some special treaty;<sup>16</sup> but they may be guilty of the offence on board foreign ships.<sup>17</sup>

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<sup>14</sup> Cf. Heffter, § 73 *ad fin.*; Ortolan, No. 928. [Cf. pp. 486, 661].

<sup>15</sup> Vattel, i. § 232; Heffter, § 104; Fœlix, ii. § 545; Lewis, pp. 12, 13.

<sup>16</sup> Heffter; Lewis, pp. 11, 12.

<sup>17</sup> As to the case of different criminal laws in the provinces of the same State, see *supra*, § 28 *ad fin.*, and the decision of the Supreme Court of Appeal at Munich, cited by Temme, Arch. ii. p. 161, along with Temme's note in harmony with our theory, p. 188, note 1.

## Sixth Part.

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### CRIMINAL PROCEDURE.

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GENERAL—LEADING EVIDENCE ABROAD—CITATION—EFFECT OF FOREIGN SENTENCES AS REGARDS INFAMY—CONFISCATIONS.

#### § 146.

It follows, from what has already been said as to the law of civil procedure, that all application of the rules of foreign criminal procedure must be excluded. But, further, the exceptions which were recognised in the case of civil procedure<sup>1</sup> cannot be recognised here, since the nature of criminal law prevents any agreement of parties as to the competency, the force and the effect of rules of criminal procedure ; while, although it is conceivable that some material provision of penal law may take the shape of a rule of procedure, that would be of the most subordinate importance, because there is very little opportunity for foreign penal law to take any effect in the judgments of our courts.

But, since the force of official documents as evidence is not confined to the domain of civil law, and depends, as far as form goes, upon the law of the place where they were drawn up, an "act of instruction," drawn up by the competent officer in a foreign country, must possess the same value in evidence as one drawn up by an official of this country, in so far as the requirements of the law of the

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<sup>1</sup> Cf. *supra*, § 116.



place of execution for the validity of the document are observed.<sup>2</sup>

On the other hand, the question as to whether the conduct of the inquiry has been fairly carried out—*e.g.*, whether the witnesses have been sufficiently interrogated as to their personal circumstances, or whether the judge should have used personal inspection or taken the assistance of experts, can only be solved by the law of the court before which the case depends : here we have to deal with the means of persuading the judge, and that must be effected in accordance with his own law.<sup>3</sup> If the formal conditions of the validity of documents could only be determined by the law of the country where the prosecution takes place, it would often be impossible to continue an investigation where the preliminary “act of instruction” had to be conducted in a foreign country.

It is not easy to refuse to conduct an inquiry with a view to the preparation of an “act of instruction,” when this is asked by a competent official of another country. The object is to ascertain truth, and the State is not, thereby, likely to be prejudiced. Where, however, a Government holds any inquiry to be prejudicial, it may, since the State which makes the demand has no absolute right to be assisted in its prosecutions apart from special treaty obligations, decline to conduct it, or forbid its courts to do so ; and they must carry out any such instructions, since Government has control over all our relations with other countries.

The duty of giving evidence depends upon the law of the place where the witness resides.<sup>4</sup> The special question, as to

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<sup>2</sup> We suppose, of course, that the foreign State is one whose officials can be fully credited. Cf., too, the judgment of the Supreme Court at Berlin of 11th May, 1854, reported by Temme, Archiv. 3, p. 463, which ascribes the same force to the oath of a witness taken in a foreign country according to the forms there recognised, as to an oath administered according to our own forms.

<sup>3</sup> Cf. Heffter ; Völkerr, § 36 *ad fin.*

<sup>4</sup> A witness cannot be compelled to leave his own country to give evidence unless the court is situated quite close to the frontier. There are various provisions upon this point in treaties. Cf., *e.g.*, treaty between Hanover and Belgium of 20th October, 1845, art. 11 ; between Hanover and Oldenburg, 13th June, 1815, No. 9 ; Hanover and Bremen, art. 9 ; and Krug, p. 60. Cf. *supra*, § 124.

whether evidence may be refused, if the act which is the subject of the inquiry is plainly no criminal act by the law of the State on which the demand is made, must be answered in the affirmative, unless some other answer is supplied by the special stipulations of each particular country: for the assistance which foreign States give, and the consequent obligation upon their subjects to co-operate in the support of law and order in a foreign country, does not extend to the prosecution of charges which depend on some particular statute.<sup>5</sup> An exception, and the only exception, is made in the case of witnesses for the defence, since the right of the accused, which is here in question, may well rank with the rights of a private person at issue in a civil action, and in a civil action the courts of all countries will aid in collecting evidence.

The citation of the accused, unless it is accompanied with a threat of compulsion or diligence, may be viewed as an opportunity given to the person so cited of defending himself; and, therefore, there is no danger in allowing the citation to be served, even although the crime charged is not liable to punishment by the law of the State where the accused is.<sup>6</sup> To refuse to allow it could only serve to prejudice the accused, because the foreign Government could easily substitute a public or edictal citation for personal service. It seems, however, to be proper, in order to avoid exposing the accused to a double punishment for the same offence, to take objection to the service of the citation provisionally, if the State where it is to be served has itself a claim to criminal jurisdiction other than a merely subsidiary claim, and not to execute it unless the foreign officials in spite of this common interest persevere in their contention.

It is matter of universal admission that a foreign judgment of condemnation can neither be recognised as having any legal force in another country, nor be carried into execution.<sup>7</sup>

<sup>5</sup> Cf. *supra*, § 141, and *infra*, § 150.

<sup>6</sup> Cf. *e.g.*, the agreement between Prussia and Saxe-Weimar; cf. 23-29, March, 1852, art. 36. (Gesetzsamml. für die Königliche Preuss. Staaten. 1852, p. 135.)

<sup>7</sup> Marteus, § 104; Klüber, § 64; Schme'zing, Europ. Völkerr. § 164; Wheaton, § 121, p. 166; Fœlix, ii. § 604; Story, §§ 621-28; Heffter, § 36; Berner, p.

—a principle only abandoned in isolated treaties with reference to unimportant offences, and between neighbouring States, where the criminal laws are closely alike, and each State can rely upon the matter being determined in a manner consistent with its own legal principles.<sup>8</sup> The reason of this is, that, according to the principle of an absolute material justice which governs all criminal law, every State must be convinced before it inflicts punishment that the act is liable to punishment upon the principles which it takes for its guide, and this cannot be effected except through the sentence of its own courts, unless in the case of some special statutory enactment to a different effect. To carry the sentence of a foreign court into execution, would imply that it could only have been pronounced by the law of that court, even although it is to be carried out in our territory, or else that it was competent for the criminal to subject himself voluntarily to that jurisdiction.<sup>9</sup> But both solutions are excluded in questions of criminal law.

But if the criminal judge pronounces upon some civil claim, he takes the place of the ordinary civil judge, and his determination is to be respected just in the same way as a

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168; Pütter, § 102. See, too, Austr. St. G. B., § 36 *ad fin.* "In no case shall the sentences of foreign officials be carried out in this country," Breidenbach, pp. 265-66. No exception is to be made even when the only punishment authorised is a fine.

<sup>8</sup> Cf. *e.g.*, § 6 of the agreement between Hanover and Brunswick of 19th September, 1828 (Gesetzsamml. für das Königreich, Hannover, 1818, p. 99) to ensure detection of thefts of wood, or fish, or poaching on the frontiers. Any German university carries out a sentence pronounced by another university upon students as to matters of discipline. Most of the conventions cited by Krug (p. 52) contain the provision that if a subject of one of the contracting States shall commit a crime or offence in the territory of another, and be apprehended there and sentenced (some say put upon his trial), this foreign sentence shall, if required, be carried out by the other State, not only upon the person, but upon the goods of the criminal. The limitations attached to this confine, as a rule, the execution upon his person to cases of serious crimes. Besides, in many of these conventions there is expressly reserved to the State on which the demand is made, the right of remitting the punishment or pardoning the offence. It is also presupposed that the act for which the punishment has been awarded is liable to punishment according to the law of the State upon which the demand is made.

<sup>9</sup> Cf. what has already been said as to the execution of civil judgments.

judgment of the civil court, provided always that upon the sound principles of international law the courts of that State are competent to determine the civil claim.

It often happens that a sentence expresses or implies some infamy or loss of legal capacity. Most modern authors<sup>10</sup> refuse to give any such effect to a foreign sentence ; or, at the most, allow that it produces a certain *infamia facti*, but not an *infamia juris*. Older jurists lay down that a person who has been condemned in a way which infers infamy by the *jus commune*, must be held to be *infamis* all the world over.<sup>11</sup>

It is plain that a sentence following upon an act which the law of our State does not hold to infer infamy, cannot affect the good fame and capacity of the convict in this country, in spite of a foreign judgment to that effect.<sup>12</sup> In the same way, no formal legal force in this country can be given to a foreign sentence ; but at anyrate the foreign inquiries may be used to prove that the convict has been guilty of a crime which by our law infers infamy.<sup>13</sup>

The Codes of Baden (§ 9), Prussia, Bernburg, Waldeck (§ 24), and Oldenburg (Art. 20) allow a new criminal inquiry at home, with a view of obtaining a judgment from their own courts upon the point of infamy, when one of their subjects has been tried and sentenced for some crime abroad.<sup>14</sup> There is, however, no necessity for this special procedure, the only object of which is to determine the question of infamy in every case, and the only object of these rules is, at least in so far as the discussions upon the Prussian Statute Book go, to give an opportunity of preventing persons who have been convicted of dishonourable crimes abroad, from exercising all the rights of honest people in their own country.<sup>15</sup> [The New Criminal Code of 1871 for the German Empire, by § 37 pro-

<sup>10</sup> Martens, § 104 ; Klüber, § 65 ; Wheaton, § 121, p. 166 ; Fœlix, ii. p. 316 ; Story, § 92, 623-24 ; Schmelzing, Europ. Völkerr. § 164 ; Günther, p. 731.

<sup>11</sup> Paul de Castr. Cons. L. V. cons. 320, n. 4. Bald. Ubald. in L. 1, C. de S. Trin.

<sup>12</sup> Cf. *supra*, § 42.

<sup>13</sup> Cf. Abegg. Lehrbuch der Strafwissenschaft, § 165 ; Berner, pp. 166-67.

<sup>14</sup> The Oldenburg G. B. expressly excludes the effect of a pardon in a foreign country in such a case.

<sup>15</sup> See Beseler, Comm. p. 131.

vides that a German convicted abroad of a crime inferring infamy in Germany, may be put on his trial again in Germany in order to render him infamous there, adopting the provisions of the Codes cited in the text. In Italy, the Court of Appeal at Turin has decided in the case of *R. v. P.*, 14th December, 1878, that a conviction obtained abroad does not infer infamy so as to make an Italian citizen unfit to hold public office in Italy. This is also the rule in France, and there does not seem to be admitted there any process for adopting the sentence of the foreign court, as is done in Germany.]

A sentence of confiscation pronounced by a foreign court causes a loss of property in the goods so confiscated in a way which the courts of this country must recognise, if at the time of the confiscation the goods were situated in the State which pronounced the judgment.<sup>16</sup> Confiscation does not extend to property which is situated in a foreign country.<sup>17</sup>

## II. EXTRADITION.

### A. INTRODUCTION—IDEA OF ASYLUM.

#### § 147.

No State can exercise any rights of sovereignty within another's territory except by consent. One who is prosecuted by the sovereign power of the State is therefore provisionally safe<sup>1</sup> when he sets foot upon the territory of another State; and it depends upon the will of the latter

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<sup>16</sup> This follows from the propositions laid down above, in § 64, as to the law of things, and is recognised in the interesting judgment of the Supreme Court of Austria, reported by Temme, *Arch.* 6, p. 4.

<sup>17</sup> Cf. Boullenois, i. p. 344; Marteus, § 104; Schmelzing, § 164; Fœlix, ii. § 604.

<sup>1</sup> In exceptional cases of crimes which are at once discovered, one State allows another which marches with it, in terms of treaties between them, to follow the criminal, but only upon condition of taking him before the judge in whose jurisdiction he was apprehended. Cf. Kluit, pp. 106-09. The extradition of runaway slaves is not a question of criminal law, but is to be determined on the principles of civil law. Cf. *supra*, § 47, and Marquardsen, p. 42.

whether it will permit him to remain or expel him, or, lastly, give him up to the Power which is prosecuting him.<sup>2</sup>

If the State, without itself imposing any punishment upon the fugitive for the act which has caused his flight, allows him to remain in its territory, this case is described as an exercise of the right of asylum.

The right of asylum, in international law, is, in its character and history, entirely distinct from the religious right to the same effect. The former is the result of the independent relations of one sovereign State to another ; the latter arises from the peculiar reverence with which some particular place is invested—a place which may be situated in the same territory as the prosecuting Government, but which is so hedged about that even criminals cannot be taken from it by force. This religious right of asylum was useful, and even necessary, in a stage of civilisation which was but little developed, and where the vengeance of the injured party was stronger than the criminal law, while the authority of the State was often made the instrument for oppressing the lowly and the weak ; but it has been pushed aside by the regular administration of justice in civilised States, and has little more than a historical interest in Europe, whereas the other right of asylum, and questions of extradition, have in modern times, when the intercourse between States has increased to such an extent, acquired, on that account, a special importance.<sup>3</sup>

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<sup>2</sup> Banishment and extradition must not be confounded. The former is simply a question of expediency and humanity, since no State is bound to receive all foreigners, although, perhaps, to exclude all would be to say good-bye to the international union of all civilised States ; and although in some States, such as England, strangers can only be expelled by means of special acts of the legislative power, no State has renounced its right to expel them, as is shown by the Alien Bills which the Government of England has at times used to invest itself with the right of expulsion. Cf. Kluit, p. 38 ; Marquardsen in Rotteck's and Walcker's *Staatslexicon*, Art. *Aufenthalt*, 3, pp. 13, 14.

<sup>3</sup> The only thing which the religious right of asylum has in common with the international right with which we are here to deal is the practical result, that in both cases the State is stopped in its pursuit of the accused or convicted person. As to the religious or ecclesiastical right of asylum, see in particular Bulmerincq. *Asylr.* i. p. 501 ; Amann and Marquardsen in Walcker's *Staatslex.*, 3rd edition, art. *Asybr.* i. p. 787 ; and Mohl, p. 140. See below, § 154, as to the right of asylum in ambassadors' houses.

This latter circumstance explains how it has come to pass that in modern times,<sup>4</sup> and especially in the nineteenth century, a very great number of treaties dealing with extradition and the international right of asylum have been concluded among various States.

It might be thought that by this means the question might have been completely solved, or that, at least, it would shortly find its solution by the conclusion of treaties where they do not as yet exist. But such treaties do not cover all the cases that occur, and therefore it is so far necessary to discover general principles by which we can interpret and extend them ; and at the same time we must meet the question, on what principles such treaties are to be concluded or amended in the future, so that they shall correspond with principles of law which are in other matters always respected, and with the common good. Authorities on this branch of the law have busied themselves with these questions up to the present day. Three different theories may be distinguished :—

*B. NATURE OF THE OBLIGATION TO GIVE UP CRIMINALS TO THE STATE WHICH DESIRES TO PROSECUTE THEM.*

§ 148.

Some writers say that, in the absence of a treaty, the State is under no obligation to give up a criminal. In this view extradition is a matter of discretion on the part of the Government, which will be guided by its desire to maintain friendly intercourse with other States.<sup>1</sup>

<sup>4</sup> As to the Middle Ages, see *supra*, § 131.

<sup>1</sup> The right of the State to give up criminals is hardly disputed, except in the writings of political partisans. It has specially been argued that the fugitive has not transgressed the law of the country which is to give him up ; and as he can only be arrested for transgressing these laws, his extradition implies an unwarrantable attack upon personal liberty (see specially the writings of Cauchois, Lemaire, and Gurgel, criticised by Kluit, p. 23 : *Appel à l'opinion publique. à la Haye*, 1817). But, as Kluit says, the State which gives up the criminal acts upon the commission and in aid of the State whose law has been transgressed. All the rights which belong to the prosecuting State may be urged by the State which is to give up the criminal, in so far

According to a second view, that obligation exists without any treaty. Grotius is the first so to express himself,<sup>2</sup> and proposes to hold the State which refuses to assist another in prosecuting the ends of justice, and receives the guilty party, as answerable along with the criminal. The same view is taken, although, perhaps, not so forcibly expressed, by Cocceius,<sup>3</sup> Buddeus,<sup>4</sup> and, most recently, Berner.<sup>5</sup> Vattel,<sup>6</sup> on the other hand, restricts the rule to serious crimes, which are liable to punishment in all nations, and establishes his theory on the ground that it is the peculiar right and duty of every State to punish the enemies of the whole human race, and that it will best effect these objects by giving up the criminals for punishment by the State whose territory was the scene of their crimes. According to Mohl,<sup>7</sup> there is a general order of law throughout the world, in which all States have a share,<sup>8</sup> and any crime committed in a foreign country which offends against this order is, therefore, at the same time an injury to the order of the State of the domicile; and extradition is only required because the State which demands it has the first claim, and is in the most favourable position for investigating the matter fairly; whereas, if extradition is not demanded, the State to which the criminal has fled itself

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as they are not at variance with its law. The State which has the right of punishment would be able to follow a criminal, and to arrest him anywhere, unless this were prevented by the territorial supremacy of the other States. For the view first stated in the text, see Pufendorff, *Jus nat. et gentium*, L. viii. 6, § 12; Martens, § 101; Klüber, § 64; Heffter, § 63, iii.; Fœlix, ii. No. 608; Story, §§ 626-27. Oppenheim (pp. 192, 382) denies that there is any obligation to extradition, but lays upon every civilised State the duty of concluding treaties of extradition. Schmalz, *Volkerrecht*, p. 158, declares that, as a rule, he is against extradition, because innocent persons may easily be prosecuted; and Pinheiro-Ferreira (*Cours de Droit Public*, ii. p. 32 and p. 179) proposes that there should be none, because every State must punish crime wherever, or against whomsoever, or by whomsoever it has been committed. Wheaton leaves the question undetermined.

<sup>2</sup> *De Jure Belli*, ii. c. 21.

<sup>3</sup> *Prælect. ad H. Grotii*, libro de T. B.

<sup>4</sup> *Jurispr. hist. Spec.* p. 317.

<sup>5</sup> Pp. 181-82.

<sup>6</sup> II. § 230.

<sup>7</sup> See specially p. 710.

<sup>8</sup> See, on the other hand, *supra*, § 137.



takes up the punishment, a view which Pozl seems to have adopted.<sup>9</sup>

Bluntschli<sup>10</sup> remarks that the individual does not completely satisfy the call of duty if he merely does what is right within his own sphere of activity, without offering a hand to others who need it to help them to do right in their sphere ; and just as little does a State entirely fulfil its task if it does justly in its own dominions, but declines to give to others the help they need. The duty of extradition is in this way deduced from the general interest of humanity in the cultivation of justice.

An intermediate view, lastly, assumes that there is only an incomplete moral obligation, and that it is only as a consequence of some treaty that any other State can demand the fulfilment of it.<sup>11</sup>

Against the first theory the objection may be taken that it does not sufficiently regard the rights of the fugitive. If the question of extradition is to be decided merely on grounds of expediency, we can hardly hope to attain to any rule for all cases which will permanently satisfy the legal conscience. There is, of course, nothing to prevent us from solving the question whether a fugitive is to be handed over for severe punishment, or to be allowed to remain in this country in the enjoyment of his rights, according to passing rules and interests which are foreign to the administration of justice. As Rotteck<sup>12</sup> remarks, here the legal problem is the first, and political considerations can only have play in the space which it includes. This theory seems generally to proceed upon a confusion of extradition with banishment. Banishment is regulated by rules of expediency and humanity, and is a matter for the police of the State. No doubt the police<sup>13</sup> can apprehend any foreigner who refuses to quit the country in spite of authoritative orders to do so, and convey him to the frontier. Both of these steps take place in the case of

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<sup>9</sup> In Bluntschli's and Brater's *Staatswörterbuch*, i. p. 501.

<sup>10</sup> *Staatswörterbuch*, i, p. 521 ; Marquardsen, pp. 44, 45.

<sup>11</sup> So Kluit, pp. 8, 9 ; Hélie, p. 661.

<sup>12</sup> *Staatslex.* 2, p. 40.

<sup>13</sup> Heffter and Marquardsen both hold extradition to be a subject for the police. See, on the other hand, Kluit, p. 30.

extradition ; but yet it must not be inferred, from the superficial likeness of the proceedings in extradition, that the procedure should be conducted on the same principles in both cases. It is far more necessary to keep in view the entirely different object of the rules that govern them—*i.e.*, in the one case, that the country shall be rid of a person who is dangerous or troublesome to the community ; in the other, that a criminal shall be punished.

Nor does the argument urged by Grotius and others in support of the second theory seem apposite. To refuse the remedies of the law is not in itself an infraction of the law.<sup>14</sup> The inference based upon the assumption of a general order of law throughout the world cannot be recognised if we do not recognise its foundation. The inference from a general duty of extradition must necessarily be that there is an universal State.

The reasons adduced by Bluntschli are, no doubt, just. What they prove, however, is not an absolute legal duty, but the intermediate position, which regards extradition merely as a moral duty.

The duty of assisting another in following out his rights is, in the position of private persons, no more than a moral duty. This is also the case as between two States. It may, however, be reduced to this point : that while morality often requires from individuals self-sacrifice, the State which has to represent indirectly the interests of all its subjects must always pursue an egotistical and selfish course.<sup>15</sup> No Government would be entitled to take the opposite course. It would thereby be giving away property intrusted to it for faithful administration.

Whether one State shall assist another in its prosecutions depends upon the consideration that its own interests shall not be prejudiced, although it must also be sure that the other State is within its rights.

If, then, we remember that every State must frequently be brought into the position of being forced to claim the help of

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<sup>14</sup> Kluit, pp. 8, 20.

<sup>15</sup> Of course, we do not mean a trifling selfishness which would do violence to the principles of equity, and prefer a passing advantage to the permanent good of the State.

another, in order to overtake a criminal, that in international relations reciprocity is the rule, and that we can only expect assistance from another if we are ready to give it, it follows, as a rule, that the duty of extradition is in the interest of the law of the country which is to give it, and all the more so that, in the vast increase of intercourse at the present day, the right of asylum which the State might concede to foreign criminals might easily turn out to its own prejudice.<sup>16</sup>

We make an exception, however—just because extradition is not a duty or legal obligation—in cases where to assist the foreign State in its prosecution would imply a disproportionate expenditure of trouble or money, or where a deliverance as to whether the claiming State was or was not within its rights would be prejudicial to the interests of the other.

From this position we get the following principles, which must be observed in discussing and administering questions of extradition <sup>17</sup> :—

SPECIAL QUESTIONS—CRIMINALITY OF THE ACT BY THE LAW OF THE STATE WHICH IS TO GIVE UP THE CRIMINAL—PROPER PUNISHMENT—PARDON ACCORDING TO THE VIEW OF THE GOVERNMENT ON WHICH THE DEMAND IS MADE.

## § 149.

In the first place, apart from the obvious necessity that criminals should only be given up to States in which there is a regular administration of justice, since the sole object of extradition is to support a State which is by international law and usage competent <sup>1</sup> to punish the offence, in making

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<sup>16</sup> Cf. especially Lewis, p. 35, and Mohl, p. 706. Whereas, in the Middle Ages, and, still later, when each country was shut off from the other, there were but few cases of extradition, in modern times it has become an ordinary means to execution of a sentence (Hélie, p. 726). Treaties of extradition have never had so much importance as in the present century.

<sup>17</sup> Even the confederation of several States does not make extradition a legal duty *ipso jure*. Cf. P. Voet, S. xi. c. 1, n. 6.

<sup>1</sup> According to the principles already laid down, two States may in a particular case both be competent—that in whose territory the crime is committed, and that to which the accused belongs. Apart from special provisions

good its right to inflict that punishment, the State which gives up the criminal must persuade itself that the other is within its rights ; and the first step to that is, that the act which gives occasion to the prosecution should be one which the law of the State on which the demand is made lays under threat of punishment.<sup>2</sup> Although we do not in any way assert that a foreign State, whose circumstances are entirely different from those of this country, may not be entitled to regard as criminal acts which our law does not hold to be so, yet our law can never assure us that the foreign State is right in so doing.<sup>3</sup>

It is a mere application of this rule that extradition does not take place if the crime has already suffered prescription by our law. Where our State lays down that no inquiry or

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by treaty, the State on which the demand is made may choose to which she shall surrender him ; and in this choice she must not follow the principle of giving him up to the State of his domicile, nor that of priority, nor yet absolutely the rule that he must be given up to the State against which the graver crime has been committed (cf. Kluit, p. 64 ; Tittmann, p. 26 ; Schmalz, *Europ. Völkerr. B. iv. n. cap. 3*), but rather that he must be given up to the State from which there is most reason to expect that he will be tried in accordance with the legal feelings and the law of the State which gives him up. Cf. Berner, p. 186. If this principle does not determine the question, then priority must rule, or, where more than one crime has been committed, the gravity of the offences ; while the State of the domicile can, as a rule, have no preference over that in which the act was done, since both are equally entitled to it, and the reasons which dissuade us from giving up our own subjects (*infra*, § 153), do not by any means establish that the domicile has any superior right in claiming extradition. Most treaties provide that the State where the act was done shall have the criminal. But in more modern treaties — e.g., in the treaty between France and Hannover in 1855, art. 7 — the choice is left to the State where the criminal is. The decision of the German Bund on 26th January, 1854, bound all its States to give up criminals mutually to the State in which or against which the crime was committed, in harmony with the principles of several German codes.

<sup>2</sup> Bluntschli, p. 521 ; Berner, p. 188 ; Kluit, p. 71 ; Wheaton, § 120, p. 164.

<sup>3</sup> Witte maintains the opposite view, on the ground that all States must mutually respect each other's independence and right of punishment which depends thereon. This would be correct if it were true that there could never be laws materially unjust, even in the concrete circumstances of any individual State. But since this possibility certainly does exist, all that is left is to take our own system of law as the test of the justice of other systems. We need not take trouble to show how gross an affront would be done to legal feeling if the fugitive had done some act which our law entirely sanctioned.

deliverance upon the question can any longer safely take place, or that by the lapse of time all remembrance or consciousness of the crime has disappeared, it cannot co-operate with any foreign State in the inquiry and punishment.<sup>4</sup>

In the second place, it follows from the foregoing principles that, if the fugitive is likely to be visited with some barbarous punishment, which is completely at variance with our views of law, we must refuse extradition.<sup>5</sup> To co-operate in carrying out any such punishment would be regarded as an act against moral principle.

Further, it may be that all the foregoing requisites for extradition are present, but that from the standpoint of a higher equity, as that is understood by the official in whom our law vests the prerogative of mercy, a pardon should be granted. Extradition is excluded in such a case also.<sup>6</sup>

<sup>4</sup> Marquardsen, p. 47. The rule is distinctly expressed in many modern treaties of extradition (cf. *e.g.*, the treaty of 23rd February, 1851, between Saxony and Belgium; convention between France and Prussia, 22nd June, 1846, art. 6).

[A decision of the Federal Court of Switzerland affirms this, Mattiotti, 25th July, 1877; and the principle was affirmed by the Federal Tribunal on 28th October, 1879, in the case of Lucas. By the judgment in this case it was held that one canton is entitled to refuse to surrender a refugee criminal to the authorities of another, if the crime is prescribed by the law of that canton in which he has sought asylum.]

<sup>5</sup> It is practically impossible to carry out the further requirement that, if the law of the State which gives up the criminal would punish the offence more lightly than the law of the State which demands the extradition, that more lenient punishment must be inflicted; and there is no good ground for it. It does not occur in treaties of extradition. The State which gives up the criminal is not in a position to estimate the relative punishment. See, on the other hand, Marquardsen, p. 47.

<sup>6</sup> Some treaties contain a special provision to this effect. So, *e.g.*, the treaty between Hanover and Belgium of 20th October, 1845, art. 2.

EXCLUSION OF EXTRADITION FOR TRIFLING OFFENCES ; FOR ACTS WHICH ARE ONLY PUNISHABLE BY THE LAWS OF SOME STATES—EXTRADITION OF POLITICAL CRIMINALS—EXTRADITION OF PERSONS IN NEGLECT OF DUTY BY NOT ENTERING ON MILITARY SERVICE—EXTRADITION FOR BREACH OF THE OATH OF MILITARY SERVICE.

### § 150.

The crime for which the criminal is to be given up must be of sufficient importance to justify the trouble given to the foreign State. It would, as a matter of fact, be trifling to set the Courts, and frequently the diplomatic apparatus, of two States in motion on account of an unimportant transgression—*e.g.*, a petty verbal slander—and the advantage to be obtained would not compare with the trouble that would be given to officials on both sides ; while, in many cases, a real injustice would be done to the accused, by arresting him and carrying him from the one place to the other.<sup>1</sup>

The duty of extradition is by treaties, too, confined to serious crimes.<sup>2</sup> The only exceptions to this rule are treaties

<sup>1</sup> Cf. Kluit, p. 75.

<sup>2</sup> It is, however, inadequate to limit extradition, as, for instance, in the treaty between France and England of 13th February, 1843, to cases of murder, forgery, and forgery of bank notes (cf. Marquardsen, p. 46). The treaties concluded between the United States and some States of the German Bund, such as Hanover in 1855, go considerably farther. If such treaties are not to cover all crimes, it is quite right to enumerate the offences to which they are to apply in the treaty itself. If we consider the wide range of punishment which is by more recent legislation committed to the discretion of the judge, it would lead to uncertainty and illogical results to determine the duty of extradition according to the severity of the punishment to be imposed in the particular case. But it would be just as impracticable to lay down a rule based on divisions of crimes, since on this head the most various views might be taken (cf. Mohl, p. 722 ; Marquardsen, p. 46, is of another opinion).

The treaty between France and Prussia of 21st June, 1845, describes as the crimes for which extradition may be asked and given, these, viz. :—

1. *Assassinat, empoisonnement, parricide, infanticide, meurtre, viol, attentat à la pudeur consommé ou tenté avec violence.*

2. *Incendie.*

3. *Faux en écriture authentique ou de commerce et en écriture privée y*

concluded between confederate States and laws passed by such States, and such exceptions are of course necessary in the case of States so closely united ; just in the same way where States lie close to each other, grounds of expediency will recommend an extension of the obligation ; where they lie far apart, it must necessarily be limited. It is important, in this view, that the duty of giving up criminals is not strictly a legal obligation, and may, therefore, be refused from reasons of expediency and equity.

Moreover, it will no doubt be said, in opposition to our proposal to set all acts which are made criminal merely in virtue of some legislative enactment in this or that country, beyond the sphere of extradition,—that what is called a law of nature does not exist, but that every crime is punished by the force of some positive regulation, and that we cannot say that there are any *delicta juris gentium* in the sense of natural laws.

But at the bottom of our rule there are sounder considerations. If, then, an act is not liable to punishment in all civilised States, although it may be so both in that which demands extradition and in that upon which the demand is made, we find therein a proof that the punishment of this act is not generally recognised, but needs some justification from the special circumstances of the State ; and, therefore, if extradition is to take place, it must be established that there are some such circumstances. An investigation of this

*compris le contrefaçon des billets de banque et effets publics, si les circonstances du fait imputé sont telles que s'il était commis en France, il serait puni d'une peine afflictive et infamante ;*

4. *Fabrication ou émission de fausse monnaie, y compris la fabrication, émission ou altération de papier monnaie ;*

5. *Faux témoignage, subornation des témoins ;*

6. *Vol, lorsqu'il a été accompagné de circonstances, qui lui impriment le caractère de crime d'après la législation des deux pays ;*

7. *Soustractions commises par les depositaires publics dans le cas où, suivant la législation de la France, elles seraient punies de peines afflictives et infamantes.*

8 *Banqueroute frauduleuse.*

The treaty between France and Hanover of 13th March and 9th April, 1855, embraces, in art. 2, some other crimes.

kind is, however, as a rule, so difficult, that it is better to refuse to give up the offender.

If we examine different treaties of extradition, we find this rule confirmed ; it is only the crimes which are punished in all civilised States that can found a claim for extradition ; and although some States, like those of the German Bund, which have criminal laws that have grown up upon one common historical foundation, make an exception to this rule, that does not by any means condemn the rule.<sup>3</sup>

The foregoing propositions are, upon the whole, admitted by those who lay down more exact rules for extradition, and do not hold it to be a mere matter of expediency. The debate, however, as to the extradition of political criminals has never as yet been settled.

It is, in the first place, essential to define the term "political offence." It is not coextensive with the class of offences against the State : the Treasury-clerk who embezzles Government moneys for his own ends, or the judge who is guilty of a perversion of justice, is no political offender.<sup>4</sup> It seems just that these acts only should be regarded as political offences which can be shown to arise out of a tendency to change the constitution of the State, or to revolutionise its arrangements in an illegal fashion, or which, although themselves exceeding the formal limitations of the law, can be held to be adopted as a defence against acts of the Government that are formally at variance with the law or with the principles of justice and equity.

In the first place, we must distinctly repudiate as a reason for refusing to surrender those who have transgressed the rights of a foreign State, the view that a foreign State as such has no claim to the protection of our law. Such a maxim would be a palpable offence against the equality of legal status which every country possesses : where we claim criminal jurisdiction, we cannot dispute the right of another State to do the same.<sup>5</sup>

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<sup>3</sup> Cf. the resolution of the German Bund of 26th January, 1854, art. 1.

<sup>4</sup> Cf. Mittermaier's note on Feuerbach's *Lehrbuch*, § 162, note 37. As yet there is no definition of the idea of a political crime, although the expression is used in several treaties of extradition.

<sup>5</sup> Mohl, p. 715.



The variety of the constitutions of different States does not affect the question. A republic must regard a revolution effected by force in a monarchical State just as, conversely, a monarchical State must regard it in a republic, as a crime.<sup>6</sup> It is also incorrect to describe, as Rotteck<sup>7</sup> does, political criminals, supposing them at the same time to have been guilty of such ordinary offences as robbery or murder, as a defeated party, while the State is described as the conqueror. It may be that that is the true state of the case, and that, for instance, a Government which has, but only *de facto*, the power of the State in its hands, is prosecuting the adherents of a previous régime. To assume, however, that that is invariably so, would as a matter of fact exclude in every case the punishment of political crimes, and would amount to a declaration that the State which should protect the rights of all is itself lawless.<sup>8</sup>

But it is a matter of the utmost difficulty for one State to estimate political offences committed elsewhere aright, so various are the political institutions of different countries, and, even where they are alike, so various are the ways in which they are administered or have grown up.

What may be considered in one country legitimate criticism, will be held in another to be criminal, as being a depreciation of the form of Government or incitement to rioting. Even where the letter of the law is observed, it is always possible that the spirit of the law may be indirectly evaded, and that Government may enter upon some process which will give rise to riots and disorder: a State which has no concern in the matter, if called upon to judge of such conduct, will never treat an attack upon a Government which has for a long time been in undisturbed possession of its authority, and has established a thousand claims to the affectionate regard of the inhabitants of the country upon the same footing as an attack upon a Government which has but lately come into possession of its authority, and must assert itself in this position by forcible measures.

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<sup>6</sup> Kluit, p. 85; Bluntschli, p. 522; Marquardsen, p. 48.

<sup>7</sup> Staatslex. 3, pp. 40, 41.

<sup>8</sup> Kluit, p. 79; Berner, p. 192; Marquardsen, p. 48.

Besides, it will often be that there is no sufficient assurance of an impartial judgment upon political offences being given by the State against which they have been directed, and the formal correctness of the sentence of a foreign court is not in any way binding upon another State.<sup>9</sup> What seems to be an act of justice may in truth be a service rendered to the sympathies of a political party, and to a malicious prosecution.

By refusing to give up a fugitive, we do not dispute the right of the Government, which is in possession of the supreme authority of the State, to punish those who have attacked it; if it does not desire to act upon the footing of having been in the wrong, it is bound to punish them. To refuse assistance in the prosecution is no denial of the right to prosecute, since extradition cannot be regarded as a legal obligation. If this were so, then such a refusal would imply a denial of the right upon the strength of which the assistance is demanded, and in each case the Government on which the demand was made would be forced to declare whether it held the legal claim to be well founded or not. If, on the other hand, extradition has merely the character of a moral obligation, this may always be avoided upon the ground that it is not desirable to pronounce upon the legality of the criminal jurisdiction claimed. This is the ordinary case in political offences. States will not always be willing to give up criminals merely because the prosecuting State formally shows, through its officers, that the fugitive is guilty of the alleged crime, and they cannot sacrifice the adherents of a previous Government to a party which was but lately held to be without any right thereto. If, then, it is not adopted as a general rule that there shall be no extradition, a refusal in any particular case to give up a criminal seems to be a denial of the legality of the foreign Government, or at the least implies a reflection that their procedure is unjust and inequitable, and may therefore readily lead to dangerous discussions and disputes. If a principle is logically applied in every case, no foreign States can feel insulted, but they well may if extradition is allowed to one and denied to another.

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<sup>9</sup> Cf. especially Mohl, p. 717.

Although, therefore, the Government upon which the demand is made may feel satisfied of the criminality of the act of which the fugitive is accused, it may refuse to give him up in view of the possibility of the occurrence of other cases, in which it might be driven to an irksome and often to a dangerous decision as to the legality and the conduct of a foreign Government.<sup>10</sup>

It must not, however, be overlooked that these reasons are not by any means of an absolute nature, and that, accordingly, if the political institutions of all countries were firmly established on the same footing, and were all alike administered in conformity with certain ruling principles of law,<sup>11</sup> it would then be the rule to give up political offenders also. We need not discuss whether this state of circumstances will ever come to pass.

In the meantime, we must recognise an exception in the case where States long and intimately associated in political fellowship may look upon attacks on the constitution or Government of the one as an indirect attack upon the federation and the safety of each of its members. From this point of view it may not only be justifiable,<sup>12</sup> but it may even be matter of positive enactment that political criminals shall be subject to extradition under certain conditions which may be determined according to the character of the federation; this view is also supported by the fact that the political institutions of all these federated States, although they may take various shapes, rest upon the same historical basis, and, in cases of extremity, find a common protection in the constitution of the federation. That this should be so is all the more necessary since the safety of these States may be desperately imperilled by such crimes, looking to their limited extent, and to the state of their boundaries.<sup>13</sup>

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<sup>10</sup> Cf. especially Mohl. p. 705, and Marquardsen p. 48.

<sup>11</sup> Berner, p. 192; Marquardsen, p. 48.

<sup>12</sup> Bluntschli, p. 523.

Cf. Mohl, p. 726. The resolution of the German Bund of 18th August, 1836, binds the various members to give up any persons who are accused of setting on foot any undertaking directed against the sovereign of any other of the States or against its existence, integrity, constitution, or security, or of being associated in any conspiracy which has any such object, or of being

Most modern authorities<sup>14</sup> recognise that political refugees should not be given up; and this principle is maintained in modern treaties between non-confederated countries, either expressly<sup>15</sup> or tacitly, the offences against the State which we have been considering not being included in the list of crimes for which extradition is to take place.<sup>16</sup> No treaties are in modern times concluded between States unless they are confederated, in which all crimes, even although political, are made the ground for extradition;<sup>17</sup> any exceptions may be explained, like that between Austria, Prussia, and Russia in 1834,<sup>18</sup> by the peculiar circumstances of the time, since these contracting powers held it to be necessary to co-operate

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favourable to any such plan. The 4th Article of the Act of Union of the United States binds all States to the mutual extradition of criminals for treason, felony, or any other crime, while the 50th Article of the Swiss Constitution provides: "a decree of the Federation as to the extradition of criminals by one Canton to another shall have a universal force; extradition for political offences cannot, however, be made binding.

<sup>14</sup> Besides the authors already cited (Kluit, Mohl, Bluntschli, Marquardsen, Pozl, and Berner) see Lewis, p. 44; Fœlix, ii. § 609, and the quotations there given. Heffter, too (p. 119, note 1), admits that in such cases it will often be sought to impose an inadequate penalty, and the modern usage in treaties is certainly against extradition. Dollmann, in Bluntschli's *Staatswörterbuch*, i. p. 817, distinctly declares himself as in favour of extradition.

<sup>15</sup> Cf., e.g., the treaties between Hanover and France, 13th March, 1855, art. 8; Saxony, 28th April, 1850; Prussia and Belgium, 29th July, 1836, art. 7; Hanover and Belgium, 20th Oct. 1845, art. 6; Prussia and France, 21st June, 1845, art. 8; Prussia and the Netherlands, 17th Nov. 1850, art. 4.

<sup>16</sup> Cf., e.g., the treaty between the United States and Hanover, 18th Jan. 1855, art. 1. It is well known that England, like the American Union, does not give up political refugees, see Lewis, p. 45.

<sup>17</sup> Cf. on that point Püttlingen, p. 186.

<sup>18</sup> Hugo Grotius ii. c. 21, §§ 4-6, especially mentions among the crimes for which it is usual to give up criminals those "*quæ statum publicum tangunt*," and alludes to various old treaties, in virtue of which *Rebelles* and *Profugi* might have been claimed. In modern times, however, treaties of extradition have been much more carefully constructed and developed, and the saying of Clarus, *Sent. L. v. S. fin. qu. 38, n. 19*, as to treaties of extradition—viz.: "*Sed talia capitula non solent nisi ad libitum observari*"—has long been true, especially in the case of political offences. (See Marquardsen, p. 45, for an account of a dispute that took place in the 17th century as to the extradition of political refugees.) Besides, all offences against the State are not political offences.

one with another against one organised revolution which threatened the position and power of them all. Such an exception may easily be reconciled with the principles which we have laid down. If one Government is completely persuaded of the guilt of the refugees, and that they are making common cause with some revolution in its own territories, it may certainly be justified in assuring the other Government of its aid, and in this way averting the danger which threatens itself, and therefore may give up such refugees. It would not, however, harmonise with the rules we have laid down, if a Government should undertake to allow extradition for any political offence, whether it sprang from a revolution of a character which threatened the stability of both Governments alike or not, or the system was to last for a period in excess of the period for which the revolution should last.

After what has been said, it will be seen that it is not from any favour to the offence that, as a rule, we must refuse to give up political refugees; still less is our judgment affected by any such doctrine as that it will always be unfair to visit such offences with punishment, and that measures against them can only be justified as being acts of self-defence. The rule is a logical deduction from the principle that the State, which is not the minister of any foreign will, shall not give up an offender, unless it is persuaded that thereby it is furthering the ends of justice. "The more closely States are connected in their legal institutions and their fundamental conceptions of criminal law, the less dangerous is it that they should mutually recognise the duty of surrendering criminals, and the more widely will the practice of doing so extend. On the other hand, the more divergent their legal conceptions and institutions are from each other, the more difficult is it to satisfy the necessary conditions for extradition, so that at last it disappears."<sup>19</sup> No one can dispute that at the present time the political conceptions and institutions of different countries of the same grade of civilisation, and still more their fashions of administration, are widely different from each other.<sup>20</sup>

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<sup>19</sup> Bluntschli, p. 521.

<sup>20</sup> At the same time it is not inconsistent with what has been said, and is

Several authors have gone further, and declared themselves against the extradition of persons who have not discharged the duty that lay upon them of entering the army, or who have deserted after entering it; this they maintain, partly on the ground that the duty in which they have failed is purely of a positive nature, and by emigration or flight is destroyed, since it is merely a duty to the society of a particular country, even although the law of the State where the refugee is recognises the obligation as reasonable and equitable;<sup>21</sup> partly because, putting out of sight the excessive penalties sometimes imposed in such cases, if all who were liable to military service were to be surrendered, the obligation would be imposed upon men of all ages and conditions, and a means would thus be found of evading the prohibition against the extradition of political offenders.<sup>22</sup>

As regards the first case,—the extradition of persons who have not yet actually entered the army,—it will seldom be found that it is proposed to inflict any punishment of such severity as is usual in cases where extradition is asked, so that for this reason a person in that position is seldom demanded for extradition, and all assistance must undoubtedly be refused by us, if in the view of our law the obligation is oppressively heavy, or if failure to satisfy it is threatened with inordinate penalties. Now, although it is

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indeed essential to the friendship of adjoining nations, that acts of hostility committed in any State against a foreign power shall be liable to punishment, and that regulations, varying with the circumstances, shall be framed so as to prevent such acts (*e.g.*, that the refugees should be confined or banished). This is a far better way of securing the safety of the foreign State than the extradition of the refugees. Although it may be that political offenders are encouraged in their undertakings by the remembrance that if the worst comes to the worst they may find an asylum in a foreign country, still questions as to extradition do not arise till the immediate danger for the State which is threatened is past; and it is primarily the hope of the success of the plan which, in political crimes, will make the party of attack dominant, and therefore free them from punishment, and not the uncertain prospect of escaping in case of failure, that determines the conspirators. Complaints, too, are more frequently made because refugees are allowed to renew their attempts upon foreign soil, than because of any refusal to give them up. See Mohl's Notes, pp. 718, 758; Lewis, p. 71.

<sup>21</sup> Rotteck, Staatslex, ii. p. 41.

<sup>22</sup> Mohl, p. 723.

a most material consideration that this obligation to serve in the army is not recognised by all nations,<sup>23</sup> a Government cannot be blamed if, for the sake of keeping up its own military system, it allows the extradition of foreign conscripts in order to be able to claim a reciprocal favour from the other State; it must, however, on the one hand, not overstep these general principles, and must lay down distinct provisions in any treaty on the subject, to prevent abuses; and, on the other, there must be a pressing necessity for this mutual aid. In all circumstances, a Government must exercise the greatest care in carrying out a duty of this kind.<sup>24</sup>

On the other hand, a breach of the military oath must be recognised as a criminal offence by all civilised peoples; in this case, too, extradition is as a rule justifiable, and there is no ground for any exception, unless the obligation imposed by the foreign State plainly goes beyond the limits which our law holds equitable, or unless entry into the service is effected in some way that offends our legal conceptions—*e.g.*, by recruiting for some immoral consideration, or unless the deserter is to be punished in a barbarous fashion, and the State which demands extradition will not agree to bind itself to any abatement of the penalty.<sup>25</sup> Cartels which deal exclusively with deserters concluded between States in which the obligation of military service rests on pretty much the same basis, and in which any violations of that obligation are regarded in pretty much the same light, are by no means to be condemned, and have been actually concluded in very many cases:<sup>26</sup> there is no force in the objection that these are mere questions as to the satisfaction of social duties, since the liberty of emigration, which every subject enjoys, can

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<sup>23</sup> Cf. *supra*, note 3.

<sup>24</sup> Some Governments have concluded cartels applicable exclusively to refractory conscripts.

<sup>25</sup> Kluit, p. 78, lays down that, in the absence of special treaties, the general rule must be that there shall be no extradition.

<sup>26</sup> See upon these treaties, Fœlix, ii. § 602; Püttlingen, p. 290; Wheaton, § 120, pp. 164-65. It seems proper, since the military regulations of another State are so easily altered, that these treaties should only be concluded for a specified time, or that notice of any alterations should be required. In recent treaties this has, as a rule, been done.

only be exercised upon the footing of having satisfied the duties which all States recognise as just.<sup>27</sup>

Offences against revenue laws will, lastly, as a rule, not give rise to extradition, just because the penalties provided for these offences affect property only, and are not of a police character.<sup>28</sup> Even the resolution of the German Bund, on 26th January, 1854, excepts such offences from the law of extradition, although the union of several States in a fiscal confederation promises an extension of the ordinary legal remedies, in so far as offences against the common system of finance are concerned.<sup>29</sup> Such a union may give occasion for the punishment of acts which are directed against foreign fiscal regulations only.<sup>30</sup> It is, however, to be kept in view that in the case of fiscal offences no assistance can be expected from other countries unless there is a special treaty.

Since extradition is not to take place, as we have shown, for all crimes and offences, the person who is given up cannot, after that has taken place, be punished for any crime other than that stated to the foreign Government, without the concurrence of that Government being first obtained, or unless the act was committed after extradition had taken place.<sup>31</sup> The fact that the one crime is allied to the other cannot make any difference.<sup>32</sup>

Any other rule of procedure would do violence to the

<sup>27</sup> Treaties for the extradition of runaway sailors are very common (Kluit, p. 124).

<sup>28</sup> Cf. Mohl, pp. 724-25.

<sup>29</sup> Cf., *e.g.*, the cartel of the German Fiscal Federation, 11th May, 1833, art. 7.

<sup>30</sup> Cf., *e.g.*, the Hanoverian Law of 12th December, 1853, as to the prohibition of salt smuggling in neighbouring States.

<sup>31</sup> Cf. especially the proclamation of the French Ministry of 5th April, 1841 (Fœlix, ii. § 641). *E.g.*, if the crime charged turns out to be some trifling delict which would not justify extradition, the punishment cannot be imposed; and if that should be shown in the course of the preliminary inquiry it must be stopped, unless the accused desires it to be continued.

<sup>32</sup> Hélie, p. 719. The juristic quality of the act settles the question. If a person is given up for a common crime, it is not yet determined that the concurrence of the other State would be given to his being punished for a political offence.



international agreement which is at the bottom of all extradition.<sup>33</sup>

EXTRADITION OF SUBJECTS OF THE COUNTRY—EXTRADITION  
IN CASES WHERE THE PERSON DEMANDED HAS COM-  
MITTED AN OFFENCE WITHIN THE JURISDICTION OF THE  
STATE WHERE HE IS—SUFFICIENCY OF SUSPICION.

§ 151.

All States, with hardly any other exceptions than England<sup>1</sup> and the United States, refuse to give up their own subjects : in some States this is matter of express enactment.

It rather appears to me that the ground for this refusal is not to be looked for so much in the notion that to give up its own subjects is inconsistent with the dignity of the State, and the protection which it is bound to accord to its subjects,<sup>2</sup> as in the fact that, upon the one hand, every subject has a right to remain in his own country ; a doctrine which derives confirmation from the universal recognition in modern times of the incompetency of banishing the native subjects of any country from it, and, upon the other, that an offence which gives the State occasion to take proceedings against a subject, finds its appropriate judge in that State and not abroad.<sup>3</sup> We can explain the readiness of England and the

<sup>33</sup> Heffter, p. 120 ; Kluit p. 89. In France, the criminal who has been given up may, upon the ground of the regulation of Art. 6 of the Code d'Instruction (cf. *supra*, § 33, note 9), take a formal objection in court if he is accused of any other offence than that for which he was given up. No account, of course, is taken of circumstances which heighten or lessen the criminality of the act charged. Hélie, p. 721.

<sup>1</sup> Cf. Lewis, p. 49.

<sup>2</sup> The true reason is not, as Marquardsen thinks (p. 46), that the administration of justice in the foreign State is not trusted. This would prevent any extradition at all. See, on the other hand, Lewis, p. 49.

<sup>3</sup> Against the extradition of subjects, cf. Vattel, i. § 232, ii. § 77 ; Martens, § 101 ; Wheaton, § 120, p. 164 ; Ortolan, No. 897 ; Hélie, p. 668 ; Oppenheim, p. 192 ; Mittermaier ; D. Strafverfahren, § 55 ; Berner, p. 184 ; Heffter, p. 118 ; Fœlix, ii. No. 324 ; Criminal Code of Oldenburg, art. 501 ; Belgian Statute of 1st October, 1833 (Fœlix, ii. p. 277, note 1) ; Landesgrundgesetz of Brunswick, § 206 ; Code of Württemberg, art. 6 ; of Baden, § 7 ; of Austria, § 36. Prussian subjects, too, are not given up (Berner, p. 185, note 1). In France, an Imperial decree of 23rd October, 1811, placed the extra-

United States to give up their own subjects, and the fact that it is only upon grounds of reciprocity that in some treaties concluded between the States and foreign Powers such a course is sanctioned, from the adherence of these two countries to the principle of territoriality: this would, if every State at the same time steadily refused to give up its own subjects, afford a secure asylum to the most abominable criminals—a result which, as the treaties stand, may even at the present time sometimes happen. But extradition may always take place if the crime was committed before the criminal was naturalised in the country where he is, since in that case its law has suffered no wrong, and has, therefore, no jurisdiction.

A person whose extradition is demanded cannot be given up so long as he is undergoing punishment, or is upon his trial in the country upon which the demand is made, for the prosecution of each State's own claims and rights is preferable to any claim for assistance which a foreign system of law can urge.<sup>4</sup> This, too, has been expressly recognised in modern treaties. An exception to the rule is allowed, in the discretion of the State on which the demand is made, in cases where the crime committed in its territory is trifling, while that which was committed in the other was serious. This course is made the easier by stipulating for the right of reclaiming the prisoner if he should come to be acquitted by the State that demands his surrender, except in cases where such a reclaiming should seem to be too severe a measure.<sup>5</sup>

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dition of French subjects at the pleasure of the Emperor. No use, however, is made of this provision, as to the continued validity of which there is some doubt, and in all the more recent treaties concluded by France the extradition of its own subjects is refused. Some older treaties between German States make the extradition of their own subjects matter for special agreement in the particular case; so, *e.g.*, the treaties concluded by Hanover on 24th April, 1798; with Brunswick; and on 20th May, 1828, with Saxe-Weimar.

<sup>4</sup> Heffter, p. 120; Kluit, p. 65. Cf. the resolution of the German Bund, 26th Jan. 1854, art. 1, No. 3; proclamation by the French Government, 5th April, 1841 (Fœlix, ii. § 613).

<sup>5</sup> On the other hand, the prisoner's indebtedness, as the interest of individuals, cannot be set before the public interest in his punishment, at least if extradition is asked on account of any serious crime. See, *e.g.*, the treaty between France and Prussia of 1845, art. 9, and the proclamation of the French ministry already cited.

Lastly, extradition does not come into play if the courts of the country whose assistance is sought in vindication of justice are by their own laws competent to try and to punish the offender.<sup>6</sup> There is apparently an exception to this rule, where, according to the view of the law, there is either an express<sup>7</sup> or an implied provision—*e.g.*, laid down in the “motif”—that this competency is in the case in question subsidiary only—*i.e.*, only in so far as some State with a closer interest does not require the extradition of the criminal.

If these are the material rules of law that must be observed in questions of extradition, we find that, as regards the form of carrying it out, since it cannot take place except through the arrest of the criminal, there must be sufficient suspicion to justify such procedure according to the law of the State where it takes place, and of course, as the question here is not a question of provisional management, but is concerned with an act that enters very deeply into the rights of the individual, the suspicion must be such as would justify us in placing the criminal before one of our own courts, if the competency of any of them were established. Logical necessity demands that this suspicion should be established by the machinery of the State which is to give the criminal up,<sup>8</sup> and this is the provision actually made by the treaties between the United States and the States of Europe, and also by the treaty between England and France in 1843.<sup>9</sup> In other cases the framers of treaties have been contented with a warrant for arrest issued by the courts of the country where it is to be made, a provision which no doubt contributes largely to the simplification and despatch of the process, if in both States the principles that regulate arrests and the raising of actions are pretty much the same. It is, however, not quite free

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<sup>6</sup> This is, for instance, expressly provided in the resolution of the German Bund, already mentioned (art 1, 2).

<sup>7</sup> Cf. Austrian Code, § 39.

<sup>8</sup> Kluit, p. 115; Carpzov. (Practica, P. iii. qu. 110, n. 65) following the lead of Facinacius (Praxis et theoria, i. tit. 1, qu. 7, n. 34) remarks: “*Unde summaria inquisitio præcedat necesse est, quæ oriatur ex delicti istius probatione summaria saltem a requirente literis requisitoriis inserta.*” See, too, Grotius, ii. c. 21, § 4, n. 1.

<sup>9</sup> Lewis, p. 52.

from danger where there is a possibility that in the one State the freedom of the individual may not be regarded in quite the same light as in the other.<sup>10</sup> That the grounds for suspicion must be tested by the law of the country itself does not of course prevent the accused from being previously arrested or watched on the strength of a simple intimation from foreign officials, or even without any such intimation, provided the law of the State which is to surrender him finds sufficient reason for such a procedure.<sup>11</sup>

*Note GG, on §§ 149, 150, 151.*

[In consequence of the Report of a Parliamentary Committee in 1868, there was passed in 1870 an Act to regulate the law relating to the extradition of criminals from England (33 & 34 Vict. c. 52). The object of this Act is to lay down general principles on which treaties or arrangements with foreign powers for the extradition of criminals may be concluded. These arrangements when made are to be embodied in an Order of the Privy Council, and laid before Parliament, and no arrangement is to be made except according to the general provisions of the statute. It is provided that fugitive criminals for whose surrender provision is to be made are to be understood to be such persons as have been accused or convicted of any extradition crime committed within the territory of any foreign State, and are suspected of being in Her Majesty's dominions. There is no provision against the extradition of the Queen's subjects; the determining con-

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<sup>10</sup> Lewis blames the provision of the treaty of England with America as unpractical, and says that in most cases it actually hinders the extradition. Extradition rests upon confidence in the administration of justice by the State to which the criminal is to be surrendered, and we should put the same confidence in the warrants issued by their courts. If, as in England, there is a close adherence to the principle of an oral investigation, the most manifold difficulties must necessarily arise. But where it can be conducted in writing, the principle laid down in the text may be applied as being strictly accurate, and where the opposite is the case, a special legislative provision, giving the judge power to decide upon the ground of the result of inquiries abroad that might be laid before him, would perhaps attain justice.

<sup>11</sup> Modern treaties provide that in such a case a formal warrant must follow within a certain specified time.

sideration is the *locus delicti*. The crimes called extradition crimes are :—

Murder and attempt to murder, and conspiracy to murder.

Manslaughter.

Coining.

Forgery.

Embezzlement.

Obtaining goods on false pretences.

Fraudulent bankruptcy.

Fraud by a bailee, banker, agent, factor, trustee, or director, member, or public officer of any company.

Rape.

Abduction.

Child-stealing.

Burglary and housebreaking.

Arson or fire-raising.

Robbery.

Threats by letter.

Piracy.

Sinking a vessel at sea, or conspiracy to do so.

Assault on board ship on the high seas with intent to do grievous harm.

Revolt or conspiracy to revolt on board ship on the high seas against the master.

No one is to be surrendered for a political offence, or if the object of the surrender can be shown to be to try him on a political charge, although he is accused of some other crime ; nor is any criminal at all to be surrendered unless the law of the State demanding the surrender shall make provision that he is not to be tried for any offence other than that for which he is given up without being allowed an opportunity of returning to the Queen's dominions. It is also provided that where a prisoner has been surrendered to England, he shall have an opportunity of returning, or shall be restored to the country which surrendered him before being tried on any new charge.

The German Code of 1871 forbids the surrender of a German citizen for any crime, and this is the principle generally adopted on the continent of Europe, as stated in the text. In the statute just referred to there is no provision of the kind ; and as the language of treaties con-

cluded in accordance with its provisions generally leaves it in the discretion of the high contracting parties to apply their own law on this point, the practice is regulated by the usage of the country on which the demand for surrender is made. The Lord Chief-Justice Cockburn, in *Tirnan's case*, 1864, 5 Best & Smith, 679, enunciates the principle upon which English courts proceed thus: "A British subject who commits a murder in the United States may be tried and punished by our municipal law, which is made to extend to its citizens in every part of the world (24 & 25 Vict. c. 100, § 9). But it would be highly inconvenient, except in certain exceptional cases, that he should be tried in this country for that crime, because criminals escape, not only by being beyond the reach of the law they have offended, but in consequence of the difficulty, if not impossibility of proof, unless the offender is brought to justice where the offence is committed." When it is added that the provisions of the statute 24 & 25 Vict. c. 100, quoted by his Lordship, do not apply save to murder and bigamy, and that the territorial principle is most strictly observed in England, the result of not surrendering English subjects would be not merely a risk, but a certainty of their impunity. Hence, where, in a treaty with Austria, the provision occurred, "that in no case, and on no grounds whatever, shall the high contracting parties be held to concede the extradition of their own subjects," and an attempt was made to contend that the provisions of this article made it as impracticable for England to surrender to Austria an Englishman as it would be to obtain the surrender of an Austrian from Austria, the magistrate (Mr. Vaughan) rightly held that the language of the article gave him a discretion in the matter, and that it had been so framed in order that the guilty Englishman might not escape by taking refuge in England, as he would do if his crime were any other than murder or bigamy; while the Austrian courts, on the other hand, should not be required to do violence to the principles of law administered by them, they having the power and being in the practice of punishing their subjects for crimes without regard to the *locus delicti*. The criminal was accordingly given up. This was in the well known case of *De Tourville*, then charged with murdering his wife on the *Stilfser Joch*.

in Austria, subsequently convicted of that crime and sentenced.

There may be a difficulty, as is indicated in the text, in determining what shall constitute a political crime. It was proposed by the committee in their report that the statute should bear that "any person accused of a crime which is deemed by the party to the arrangement of whom the surrender is demanded to constitute assassination or an attempt to assassinate shall not be" surrendered. The determination of the character of the offence has, however, been left to the Secretary of State.

Various instructive cases have occurred under the proviso, that no one shall be tried for any other crime than the extradition crime for which he was given up, as well as under the similar conditions which occur in most treaties, and have had judicial interpretation given them. The words in the English statute which governs the terms of all English treaties for English judges are—"for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded." It was held that these words did not prevent the incarceration of a person surrendered by the French authorities on a charge of fraudulent bankruptcy, the ground of incarceration being a contempt of the Court of Chancery. That court had ordered the prisoner to produce certain papers. He had fled the country, and was surrendered upon the charge of fraudulent bankruptcy. On this charge he was acquitted; but before he could return to France, was thrown into prison for contempt of the Court of Chancery, in respect of his failure to obtemper their order. An application for his discharge, founded on the terms of the extradition statute, was refused. It was held that the statute referred exclusively to criminal charges, and that, contempt of court being no crime, and the punishment following on it being a species of civil diligence, the statute did not apply (*Pooley v. Whittam*, 15 Ch. Div. 435, July 23, 1880). In the same way, the American courts have held, interpreting a similar clause in the case of a criminal surrendered by France, that, if arrested on civil process, he could derive no benefit from the statute (*Adrianee v. Lagrave*, 1874, 59 N. Y. 110). It is to be remarked that in both of

these cases the court was satisfied of the *bona fides* of the criminal charge preferred. If there had been ground for believing that the civil creditor had contrived false affidavits, or had simulated a criminal charge in order to execute the civil diligence, they would not have been suffered to take advantage of their fraud.

But it has been held that one given up on a charge of rape may be tried on a charge of assault with intent to ravish (Rich, 31st May, 1877, C. de Cassation at Paris). The same court has gone a good deal further, in holding that a person surrendered on a charge of fraudulent bankruptcy cannot complain of being tried and sentenced for forgery as well, if the whole sentence is not greater than it was competent to pronounce for the former crime by itself (Brandoly, 25th August, 1876). A criminal cannot be tried for any offence that does not happen to be included in the treaty of extradition under which he was given up, even although the charge is less grave than that preferred against him before the foreign authorities. It is doubtful whether he can consent to be so tried, or whether the incompetence of the court is absolute (Cour. de Cassation, Brussels, 9th July, 1872).

An interesting question has been stirred in Italy in connection with this subject—Is it competent to put a person surrendered for having committed a particular act, which has been represented to the foreign authorities as falling under one legal category, on his trial for the same act under a different legal designation? Can one who has been surrendered on a charge of assault be tried for assault with intent to murder, or, if the victim dies, for murder? The courts of Florence have said that he may, provided that the new charge is, as well as the old one, an extradition crime. But a soldier surrendered for assault could not be tried for the military offence of assaulting his officer, which is not a crime included in the treaty under which he was given up.

A corollary from these provisions is, that one Government, having obtained the surrender of a prisoner on one charge, has no jurisdiction to transfer him to a third Government. Switzerland, having obtained the surrender of a criminal from England, cannot transfer the criminal to German juris-



diction without allowing him to return, or restoring him to England (Federal Court, 16th March, 1877, Dürrieh)].

COMPETENCY OF DIFFERENT OFFICIALS—PRACTICAL EXECUTION OF THE PROCESS OF EXTRADITION—EXPENSES—TRANSMISSION OF PRODUCTIONS.

§ 152.

Extradition only takes place after diplomatic communications and under authority of the supreme magistrate, unless in adjacent States a direct demand by the officials of the courts of law is allowed.<sup>1</sup> In France, Holland, and Germany the officers of the courts of the country making the demand apply to their minister of justice, who has to request the minister for foreign affairs to take the proper steps, while conversely the conduct and decision of the matter rest upon the minister of justice in the foreign State.

It is certainly expedient that extradition should not be committed at all to inferior officers, or at least committed to them only to a limited extent, since, even where there is a treaty, questions of difficulty may easily arise, and the inferior judge is frequently not in the position to supply himself with material necessary for the expounding of the treaty; this is the rule of most treaties.<sup>2</sup>

Further, although the power of deciding points of dispute in the treaties is in the States of the European continent committed to Government and not to courts of law,<sup>3</sup> the

<sup>1</sup> It is no exception to this rule that in England the Home Secretary conducts extradition proceedings. There is no special administrative functionary such as the minister of justice, and his duties are in many other matters managed by the Home Secretary. Gneist. *das Englische Verfassungs-und-Verwaltungsrecht*, i. p. 315. The revised Hanoverian Ordinance for Criminal Procedure of 1859, § 231, div. 4, provides: "As regards the execution of the sentences of foreign courts, or the extradition of natives or foreigners demanded by foreign officials, the minister of justice shall decide, in the absence of any generally applicable enactment or special treaty. Officers of justice here are to report to him in cases where that is necessary."

<sup>2</sup> *E.g.*, in Prussia (cf. Berner, p. 196) and in Hesse (cf. Fœlix, ii. § 631).

<sup>3</sup> Cf. Farinacius, L. 1, tit. 1, qu. 6, § 42; Kluit, p. 113; Heffter, p. 120; Fœlix, ii. § 613.

provision of the Prussian law and of the Belgian, enacted respectively in 1805 and 1833, recommends itself—viz., that extradition should not take place until Government has obtained the approval of one of the higher courts.<sup>4</sup> This plan, which makes international remedies in matters of criminal law more akin to<sup>5</sup> the other rules of criminal procedure which are generally recognised, not only relieves the Government of serious responsibility, but also protects it against any unfair demands from a foreign State, which will not readily tax the sentence of judges with any bias or party feeling.

Since every State may exercise its discretion as to the punishment or pardon of a criminal who has transgressed its criminal law, no one can require any State to accept an offer of extradition unless there be some special provision in a treaty to that effect;<sup>6</sup> its obligation to take back its own subjects into its territory is of course not affected by this.<sup>7</sup>

Extradition as a rule takes place upon the frontier, or else the criminal is put on board of a ship belonging to the State which desires to try him. If he requires to be conducted through the territory of any third State,<sup>8</sup> the consent of this State must be obtained.<sup>9</sup> Further, since the extradition takes place on the demand, and in the interest primarily of the prosecuting State, the expense must be borne by it;<sup>10</sup> in

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<sup>4</sup> The proper course for any magistrate to whom direct application is made by the officers of a foreign State, if there is danger in delay, is to apprehend the accused and to make that known to the foreign officials, but to report to his superiors that a demand for extradition has been made, cf. Kluit, pp. 104-12. Convention between Hanover and the Netherlands, 28th Oct. 1817, arts. 8-9. [See the provisions of the Extradition Act in England, 1870. In Belgium it has been held that judicial authority is not required for the surrender where an extract-sentence of a foreign court in proper form is produced to the minister. Cour de Cass. at Brussels, 9th July, 1872.]

<sup>5</sup> Hélie, pp. 703-12; Berner, p. 196; Marquardsen, p. 50.

<sup>6</sup> Kluit, pp. 92-3; Heffter, p. 120.

<sup>7</sup> Cf. *supra*, § 30.

<sup>8</sup> The resolution of the German Bund so often mentioned was of course bound to pronounce that they should pass freely (art. 7).

<sup>9</sup> Where there is no treaty a promise of reciprocity is as a rule required.

<sup>10</sup> Kluit, p. 120.

many treaties, however, States have given up their claims for any expenses incurred within their own territory.

Where a criminal is given up, it seems to be suggested, by the reasons which justify the surrender, that articles to be produced as evidence found upon the prisoner or in his possession should be given up at the same time;<sup>11</sup> this duty is recognised in treaties, as well as the further obligation involved in the duty of extradition—viz., to interrogate the witnesses, and in adjacent countries to produce them at the trial.

### C. IMPORTANCE OF TREATIES OF EXTRADITION.

#### § 153.

As we have said, within certain limits, the extradition of ordinary criminals will not be lightly refused, even where there is no treaty of extradition.<sup>1</sup> At the same time, the importance of these treaties is not to be lightly estimated.<sup>2</sup> In the first place, it is not possible to regulate *a priori* the cases in which extradition should be allowed, at least, in so far as that is affected by the gravity of the crimes, and just because of that it will serve a useful purpose to unite therewith some rules that will be generally recognised, that we may not fall into hasty or contradictory decisions in practice. In the second place, by the establishment of some such general rules, unprofitable disputes and elaborate discussions will be avoided, and officials will be enabled to prosecute criminals with more celerity. Lastly, complete reciprocity will be secured. At the same time, it should not be overlooked that such treaties have assisted the development of our subject in the most marked way.<sup>3</sup>

<sup>11</sup> Kluit, p. 119. Cf., *e.g.*, the treaty between France and Prussia, art. 3.

<sup>1</sup> The special restrictions imposed upon the Governments of England and the United States by the constitution of their countries explain, as we have determined in the text, why they refuse to give up criminals except where a treaty exists (cf. Kluit, p. 37; Fœlix, ii. § 641; Levita im Gerichtsaa, 1857, p. 22).

<sup>2</sup> Hélie, p. 693-94.

<sup>3</sup> Cf. *supra*, § 150.

RIGHT OF ASYLUM IN AMBASSADORS' HOUSES,  
OR ON BOARD SHIP.

§ 154.

No right of asylum can be claimed for the houses of ambassadors unless there be some special concession of such a right from the State to which they are accredited.<sup>1</sup> For the rights of extra-territoriality which ambassadors enjoy do not import that their houses are to be treated as if they were really beyond the territory, but merely as protecting the person of the ambassador from the jurisdiction of the State and its criminal law. Other persons, who do not enjoy these privileges as the members of his family do, may be arrested there. But in such cases the papers of the ambassador must remain undisturbed, and notice will be given to the ambassador before any arrest is made, so as to avoid doing any violence to his peculiar rights.<sup>2</sup> It will not now avail as an argument that in earlier days European States allowed the houses of ambassadors to enjoy the right of asylum. [See *supra*, p. 699, Reichsgericht at Berlin.]

On the other hand, I am inclined to think that an asylum can be afforded to fugitives on board foreign ships of war, since in this case there is not a mere personal extra-territoriality, but one that is inherent in the thing itself,<sup>3</sup> always reserving to any State the right of opening its ports to foreign ships of war solely on condition that they shall not take refugees on board, and also the right to require the

<sup>1</sup> As a rule, by virtue of special treaties, the houses of the consuls of European Powers in the pagan States of the East enjoy a right of asylum. Ortolan, No. 947; Amann and Marquardsen, in Rotteck's Staatslex, i. p. 798.

<sup>2</sup> This notice may be given in the form of a request to allow the arrest to take place; and if this permission is refused, then a remedy may be sought through diplomacy. In any case, the house can be watched, and, if necessary, be entered by force. Cf. Kluit. p. 94; Hélie, p. 559; Heffter, § 63, ix.; Ortolan, §§ 521 and 945; Amann and Marquardsen, pp. 797-98.

<sup>3</sup> Cf. *supra*, § 115. Kluit, pp. 99-101, is of a different opinion.

instant departure of such ships of war as have refugees on board.<sup>4</sup>

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<sup>4</sup> As to the relation of different provinces of the same State, see what was said, *supra*, § 28, and in discussing civil procedure. As a rule, unconditional execution will take place here, even although there may be various criminal regulations—*e.g.*, police regulations—in force in the various States. Cf., *e.g.*, the Revised Criminal Procedure for Hanover, § 231, rule 1.

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